(23,475)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 407.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY

vs.

CHARLES J. RIEFLER AND JAMES A. HALL.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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1 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1912, October Session.

No. 1888.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiff in Error,

vs.

CHARLES J. RIEFLER and JAMES A. HALL, Defendants in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

Before Baker and Seaman, Circuit Judges.

In this case questions of law have arisen regarding which this court desires the advice and instruction of the Supreme Court.

The facts from which the questions arise are these: United States Fidelity and Guaranty Company is a bonding company having its home office at Baltimore, Maryland. In 1905 the Company had at Springfield, Illinois, an agent who had authority to solicit and submit business but there is no evidence that he had any authority to execute bonds for the Company. One Dooling was elected recorder (treasurer) of the Court of Honor at Springfield for a term of one year commencing February 1, 1905. The Court of Honor required Dooling to give an official bond. On February 25, 1905, Dooling applied to the Springfield agent of the Company; the agent informed Dooling that the Company would become surety on his official bond only on condition that he furnish indemnity against loss through the suretyship; the agent gave Dooling a printed form of indemnity bond; Riefler and Hall, at Dooling's request, signed and
2 sealed the indemnity bond and also filled in property statements on the back thereof. Rieffer and Hall signed and sealed the indemnity bond for the purposes therein expressed and authorized Dooling to deliver it to the Company through its Springfield agent. Dooling delivered the indemnity bond to the agent, who thereupon forwarded it to the home office of the Company, stating that Riefler and Hall were financially good and recommending that the Company accept their indemnity bond.

The indemnity bond is as follows:

"Know All Men by These Presents, That Charles J. Riefler and James A. Hall, of Springfield, Illinois, are held and firmly bound unto The United States Fidelity and Guaranty Company, in the just and full sum of Five Thousand Two Hundred Dollars to be paid to the said The United States Fidelity and Guaranty Company,

its certain attorney, successors or assigns; to the payment whereof well and truly to be made and done, we do bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this Twenty-fifth day of February, in the year nineteen hundred five.

"Whereas, The said The United States Fidelity and Guaranty Company, has become or is about to become surety, at the request of the said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof.

"Now the Condition of the Above Obligation is Such, that if the above bounden Frank E. Dooling, his executors or administrators, shall at all times hereafter save harmless and keep indemnified the said The United States Fidelity and Guaranty Company, its successors and assigns, against all suits, actions, debts, damages, demands, cost charges and expenses, including court costs and counsel fees at law or in equity, and against all loss and damages whatever, that shall or may at any time hereafter happen or accrue to the said The United States Fidelity and Guaranty Company, its successors or assigns, for or by reason of the suretyship of the said The United States Fidelity and Guaranty Company, as aforesaid, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue in law."

3 When, on February 25, 1905, Riefler and Hall signed the indemnity bond, the Company had not become surety on Dooling's official bond; Dooling had not signed his official bond; and a copy of the intended official bond was not attached to the indemnity bond. On March 10, 1905, the Company, in reliance on Riefler and Hall's indemnity bond, executed the Dooling official bond as surety, and sent it to its Springfield agent. On March 12, 1905, Dooling signed his official bond as principal, and it was thereupon delivered to the Court of Honor. Dooling was never requested to sign and did not sign the indemnity bond. Riefler and Hall never had notice and there is no evidence that they or either of them had any knowledge that they had been accepted by the Company as indemnitors or guarantors, or that the Company had executed Dooling's official bond as surety. No pecuniary consideration was paid to or received by Riefler or Hall for executing the indemnity bond. There was no antecedent agreement that Riefler and Hall or either of them should execute the indemnity bond, or that the Company would accept them as indemnitors or guarantors.

Questions: (1) Was the instrument which was signed by Riefler and Hall, and relied on by the Company, a completed contract of indemnity or guaranty? (2) Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the Company in accordance with Davis v. Wells, 104 U. S., 159, and Davis Sewing Machine Co. v. Richards, 115 U. S. 524? (3) And, if

in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?

FRANCIS E. BAKER,
WILLIAM H. SEAMAN,
Circuit Judges.

Endorsed on cover: File No. 23,475. U. S. Circuit Court Appeals, 7th Circuit. Term No. 407. The United States Fidelity & Guaranty Company vs. Charles J. Riefler and James A. Hall. (Certificate.) Filed December 30, 1912. File No. 23,475.

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IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1913.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiff in Error,
vs.
CHARLES J. RIEFLER and JAMES A. HALL,
Defendants in Error.

Certificate from the United States Circuit Court of Appeals for the Seventh Circuit, certifying questions of law upon which it desires instruction.

Brief for Plaintiff in Error, United States Fidelity & Guaranty Company.

STATEMENT OF CASE.

This is an action of debt upon a bond of indemnity brought by the United States Fidelity & Guaranty Company, a corporation under the laws of the State of Maryland, as plaintiff, against Charles J. Riefler and James A. Hall as defendants, in the Circuit Court of the United States (now District Court), for the Southern District of Illinois. It is now pending upon a writ of error in the United States Circuit Court of Appeals, for the Seventh Circuit, and that court has certified questions of law to this court upon which it desires instructions under Sections 134 and 239 of Chapter 231 of the act

entitled "An Act to codify, revise and amend the laws relating to the judiciary," approved March 3, 1911.

The action was tried before Honorable J. Otis Humphrey, District Court judge for the Southern District of Illinois, without a jury, by a written stipulation, who, on November 24th, made special findings of fact and thereupon rendered a judgment against the plaintiff in error (plaintiff below) for costs.

The principal facts upon which the questions of law arise and are certified to this court are stated in the certificate of the Circuit Court of Appeals as follows:

CERTIFICATE OF CIRCUIT COURT OF APPEALS.

Before BAKER and SEAMAN, Circuit Judges.

"In this case questions of law have arisen regarding which this court desires the advice and instruction of the Supreme Court.

The facts from which the questions arise are these: United States Fidelity and Guaranty Company is a bonding company having its home office at Baltimore, Maryland. In 1905 the Company had at Springfield, Illinois, an agent who had authority to solicit and submit business, but there is no evidence that he had any authority to execute bonds for the Company.

One Dooling was elected recorder (treasurer) of the Court of Honor at Springfield for a term of one

year commencing February 1, 1905. The Court of Honor required Dooling to give an official bond.

On February 25, 1905, Dooling applied to the Springfield agent of the Company; the agent informed Dooling that the Company would become surety on his official bond only on condition that he furnish indemnity against loss through the suretyship; the agent gave Dooling a printed form of indemnity bond; Riefler and Hall, at Dooling's request, signed and sealed the indemnity bond and also filled in property statements on the back thereof.

Riefler and Hall signed and sealed the indemnity bond for the purposes therein expressed and authorized Dooling to deliver it to the Company through its Springfield agent.

Dooling delivered the indemnity bond to the agent, who thereupon forwarded it to the home office of the Company, stating that Riefler and Hall were financially good and recommending that the Company accept their indemnity bond.

The indemnity bond is as follows:

> "KNOW ALL MEN BY THESE PRESENTS, That Charles J. Riefler and James A. Hall, of Springfield, Illinois, are held and firmly bound unto The United States Fidelity and Guaranty Company, in the just and full sum of Five Thousand Two Hundred Dollars to be paid to the said The United States Fidelity and Guaranty Company, its attorney, successors or assigns; to the payment whereof well and truly to be made and done, we do bind ourselves and each of our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with

our seals and dated this Twenty-fifth day of February, in the year nineteen hundred five.

"WHEREAS, The said The United States Fidelity and Guaranty Company, has become or is about to become surety, at the request of said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof.

"NOW THE CONDITION OF THE ABOVE OBLIGATION IS SUCH THAT IF THE ABOVE BOUNDEN FRANK E. DOOLING, HIS EXECUTORS OR ADMINISTRATORS, SHALL AT ALL TIMES HEREAFTER SAVE HARMLESS AND KEEP INDEMNIFIED THE SAID THE UNITED STATES FIDELITY AND GUARANTY COMPANY, ITS SUCCESSORS AND ASSIGNS AGAINST ALL SUITS, ACTIONS, DEBTS, DAMAGES, DEMANDS, COST CHARGES AND EXPENSES, INCLUDING COURT COSTS AND COUNSEL FEES AT LAW OR IN EQUITY, AND AGAINST ALL LOSS AND DAMAGES WHATEVER, THAT SHALL OR MAY AT ANY TIME HEREAFTER HAPPEN OR ACCRUE TO THE SAID THE UNITED STATES FIDELITY AND GUARANTY COMPANY, ITS SUCCESSORS OR ASSIGNS, FOR OR BY REASON OF THE SURETYSHIP OF THE SAID THE UNITED STATES FIDELITY AND GUARANTY COMPANY, AS AFORESAID, THEN THIS OBLIGATION TO BE VOID AND OF NO EFFECT, OTHERWISE TO BE AND REMAIN IN FULL FORCE AND EFFECT."

When, on February 25, 1905, Riefler and Hall signed the indemnity bond, the Company had not become surety on Dooling's official bond; Dooling had not signed his official bond; and a copy of the intended official bond was not attached to the indemnity bond.

On March 10, 1905, the Company, in reliance on Riefler and Hall's indemnity bond, executed the

Dooling official bond as surety, and sent it to its Springfield agent.

On March 12, 1905, Dooling signed his official bond as principal, and it was thereupon delivered to the Court of Honor.

Dooling was never requested to sign and did not sign the indemnity bond. Riefler and Hall never had notice and there is no evidence that they or either of them had any knowledge that they had been accepted by the Company as indemnitors or guarantors, or that the Company had executed Dooling's official bond as surety. No pecuniary consideration was paid to or received by Riefler or Hall for executing the indemnity bond. There was no antecedent agreement that Riefler and Hall or either of them should execute the indemnity bond, or that the Company would accept them as indemnitors or guarantors.

QUESTIONS:

(1) *Was the instrument which was signed by Riefler and Hall, and relied on by the Company, a completed contract of indemnity or guaranty?*

(2) *Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the Company in accordance with Davis* v. *Wells,* 104 U. S. 159, *and Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524?

(3) *And, if in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?*"

On behalf of the plaintiff in error the United States Fidelity and Guaranty Company, we contend:

(1) That the instrument signed by defendants in error, Riefler and Hall, was and is a *completed contract* of *indemnity* (not guaranty).

(2) That it was *not* a *mere offer* to become indemnitors or guarantors requiring notice of acceptance.

(3) That being neither a completed contract of guaranty nor a mere offer it could not possibly be subject to the rule recognized in *Davis* v. *Wells* and *Davis* v. *Richards*.

BRIEF OF THE ARGUMENT.

I.

THE INSTRUMENT SUED ON IN THIS CASE IS A BOND OF INDEMNITY AND NOT A CONTRACT OF GUARANTY. THERE IS A GENERIC AS WELL AS A HISTORIC DISTINCTION BETWEEN BONDS OF INDEMNITY AND CONTRACTS OF GUARANTY.

(A) *A bond of indemnity is an engagement "to secure or save harmless against loss or damage of a specified character," it is "something given to a person to prevent his suffering damage": While "a guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable for such payment or performance."*

14 Am. & Eng. Ency. of Law, page 1127.

16 Am. & Eng. Ency. of Law, pages 168 and 169.

20 Cyc. of Law and Procedure, pages 1397, 1400 and note on page 1402.

22 Cyc. of Law and Procedure, pages 79 and 80.

Vandiver v. *Pollak*, 107 Ala. 547, 19 So. Rep. 180.

1 Brandt on Suretyship and Guaranty, third edition, Section 5.

(B) *Bonds of indemnity are original and primary obligations not within the statute of frauds; while contracts of guaranty are secondary or collateral undertakings and are within the scope of the statute.*

14 Am. & Eng. Ency. of Law, page 1130.

16 Am. & Eng. Ency. of Law, page 169.

20 Cyc. of Law and Procedure, page 1402.

22 Cyc. of Law and Procedure, page 80.

1 Brandt on Suretyship and Guaranty, third edition, Section 5.

DeColyar on Guaranties and Principal and Surety, page 1.

Hawes v. *Murphy,* 191 Mass. 469; 78 N. E. 109.

Spurrier v. *Nottingham,* 7 Ky. Law Reports 453.

Campbell v. *Pucket,* 1 Posey Unrep. Cas. 465.

Hartley v. *Sandford,* 66 N. J. Law 40; 48 Atl. 1009.

Hall v. *Weaver,* 34 Fed. Rep. 104, at page 107.

McIntosh-Huntington Co. v. *Reed,* 89 Fed. Rep. 464.

Horn v. *Bray,* 51 Ind. 555.

Anderson v. *Spence,* 72 Ind. 315.

Minick v. *Huff,* 41 Neb. 516; 59 N. W. 795.

Fidelity & Casualty Co. v. *Lawlor,* 64 Minn. 144; 66 N. W. 143.

Boyer v. *Soules,* 105 Mich. 31; 62 N. W. 1000.

Smith v. *Delaney,* 64 Conn. 264; 29 Atl. 496.

Perley v. *Spring,* 12 Mass. 297.

Aldrich v. *Amase,* 75 Mass. (9 Gray) 76.

Lucas v. *Chamberlain,* 8 B. Monroe 276.

Jones v. *Shorter*, 1 Ga. 294; 44 Am. Decisions 649.

Bonebright v. *Pease*, 3 Mich. 318.

Chapin v. *Merrill*, 4 Wend. 657.

Jones v. *Bacon*, 145 N. Y. 446; 40 N. E. 216.

Resseter v. *Waterman*, 151 Ill. 169.

Saint v. *Wheeler, Wilson & Co.*, 95 Ala. 362; 10 So. 539.

Kearnes v. *Montgomery*, 4 W. Va. 29.

(C) *A guarantee must ordinarily exhaust his remedies against the person primarily liable before resorting to his guarantor: But an indemnitee can hold his indemnitor without first seeking reimbursement from any third person.*

Pingrey on Suretyship and Guaranty, Sec. 360.

Page v. *White Sewing Machine Co.*, 34 S. W. (Tex.) 988.

Reigart v. *White*, 52 Pa. St. 438.

20 Cyc. of Law & Proc. 1446, 1453.

Springfield v. *Boyle*, 164 Mass. 591, 42 N. E. 333.

Kempton v. *Coffin*, 29 Mass. (12 Pick.) 129.

Conery v. *Cannan*, 26 La. Ann. 123.

22 Cyc. of Law & Proc. 102.

Getty v. *Schantz*, 100 Fed. Rep. 577.

Phenix Ins. Co. v. *Louisville & Nashville R. R. Co.*, 8 Fed. Rep. 142.

Osborne v. *Smith*, 18 Fed. 126.

(D) *An indemnitee must have actually paid a judgment or given his own obligation to the creditor which has been accepted as payment before he can maintain an action upon the instrument of indem-*

nity; while a guarantee may maintain an action against a guarantor to compel payment of the debt itself as stated in point ("C").

Central Trust Co. v. *Louisville Trust Co.*, 100 Fed. 545; 40 C. C. A. 530.

Resseter v. *Waterman*, 151 Ill. 169 and 177.

Barclay v. *Gooch*, 2 Espinasse 571.

Carter v. *Adamson*, 21 Ark. 287.

Solany v. *Webster*, 35 Fla. 363 (17 South. 646).

Hay v. *Hansborough*, 1 Freem. Ch. 533.

Gregory v. *Hartley*, 6 Neb. 356.

Aberdeen v. *Blackmar*, 6 Hill 324.

Hearn v. *Landee*, 74 Ky. (11 Bush) 669.

Miller v. *Fries*, 66 N. J. Law 377, 49 Atl. 674.

Cochran v. *Selling*, 59 Pac. 329; 36 Ore. 333.

(E) *While a guarantor's undertaking is for the benefit of the creditor, the undertaking of a surety's indemnitor is not. The creditor cannot maintain any action upon it.*

United States v. *United Surety Co.*, 192 Fed. Rep. 992, at 994.

State v. *St. Louis & San Francisco Ry. Co.*, 125 Mo. 596; 28 S. W. 1074.

Texas Midland R. Co. v. *Miers*, 37 S. W. 640.

(F) *As a general rule an "indemnitor" is neither a "guarantor" nor a "surety": He is a "principal," although he is frequently referred to by the courts as a "surety."*

Wise v. *Miller*, 45 Ohio State Reports, 388.

Appleton v. *Bascom*, 3 Metc. 169 (Mass. 1841).

(G) *Historically, contracts of indemnity are creations of the common law, and are usually specialties (except the implied obligation created by law on the part of a principal to indemnify his surety when no express obligation has been given); while contracts of guaranty are commercial contracts having their origin in the rules of the law merchant and are usually simple contracts.*

Courtis v. *Dennis*, 7 Metcalf 510.

Edmundston v. *Drake*, 5 Peters 624.

Lee v. *Dick*, 10 Peters 482.

Daniels on Negotiable Instruments, par. 1755.

Bell v. *Bruen*, 1 Howard 169.

Lawrence v. *McCalmant*, 2 Howard 426.

Smith v. *Dann*, 6 Hill (N. Y.) 543.

Note to Lanusse v. *Barker*, 3 Wheat 148.

Kincheloe v. *Holmes*, 7 B. Monroe (Ky.) 5.

II.

INSTRUMENTS OF GUARANTY (UNLIKE INSTRUMENTS OF INDEMNITY) ARE DIVIDED INTO TWO CLASSES, (A) OVERTURES OR OFFERS TO GUARANTY (TO WHICH CLASS BELONGS DAVIS SEWING MACHINE CO. V. RICHARDS), AND (B) ABSOLUTE GUARANTIES (TO WHICH CLASS BELONGS DAVIS V. WELLS).

Pitman on Principal and Surety (published in 1843), page 28.

DeColyer on Guaranty and Principal and Surety, page 3.

14 Am. & Eng. Ency. of Law, 2nd edition, page 1145.

20 Cyc. of Law and Procedure, pages 1404 and 1407.

Cent. Dig., Vol. 25, Sec. 9, and Dec. Dig., Vol. 9, Par. 7.

(A) *The doctrine that notice of acceptance is necessary to bind a guarantor applies only to instruments which are overtures or offers to guaranty.* To this class belongs *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524.

Russell v. *Clarke,* 7 Cranch. 69.

Edmundston v. *Drake,* 5 Peters 624.

Douglass v. *Reynolds,* 7 Pet. 113.

Lee v. *Dick,* 10 Peters 482.

Adams v. *Jones,* 12 Peters 207.

Reynolds v. *Douglass,* 12 Pet. 504.

Davis Sewing Machine Co. v. *Richards,* 115 U. S. 524.

Barnes Cycle Co. v. *Reed,* 84 Fed. Rep. 601.

Steadman v. *Guthrie,* 4 Metc. (Ky.) 146, at page 157.

Kincheloe v. *Holmes,* 7 B. Mon. 5.

Oaks v. *Weller,* 13 Vt. 106; 37 Am. Dec. 583.

Newman v. *Streator Coal Co.,* 19 Ill. App. 594.

Ruffner v. *Love,* 33 App. 601.

Neagle v. *Sprague,* 63 App. 25.

20 Cyc. of Law & Prac. 1404, 1405.

(B) *The rule does not apply to instruments which are absolute guaranties.* To this class belongs *Davis* v. *Wells,* 104 U. S. 159.

Wildes v. *Savage,* 1 Story 22.

Kent v. *Silver,* 47 C. C. A. 404; 108 Fed. 365 (C. C. A. Third Circuit).

Dowd v. *Natl. Park Bank*, 54 Fed. Rep. 846; (C. C. A. Fifth Circuit).

Bond v. *John V. Farwell*, 172 Fed. Rep. 58 (C. C. A. 6th Cir.).

Cook v. *Orne*, 37 Ill. 186.

Davis v. *Wells*, 104 U. S. 159.

Newcomb Bros. v. *Emerson*, 46 N. E. 1018, 17 Ind. App. 482.

Sears v. *Swift & Co.*, 66 Ill. App. 496.

American Exchange National Bank v. *Severns*, 121 Ill. App. 480.

Acorn Brass Mfg. Co. v. *Gilmore*, 142 Ill. App. 567.

Frost v. *Standard Metal Co.*, 215 Ill. 240.

Pressed Radiator Co. v. *Hughes*, 155 Ill. App. 80.

Bryant v. *Stout* (Ind. App. Court 1896), 44 N. E. 68.

Deering & Co. v. *Mortell*, 16 L. R. A. (N. S.) 353, 110 N. W. 886.

Lane v. *Mayer*, 44 N. E. 73

Shows v. *Steiner, Lobman & Frank*, 57 So. 700.

J. R. Watkins Medical Co. v. *Brand*, 136 S. W. 867; 143 Ky. 468.

People's Bank v. *Stewart*, 133 S. W. 70; 152 Mo. App. 314.

J. L. Mott Iron Works v. *Clark*, 69 S. E. 227 (S. C. 1910).

Bank of California v. *Union Packing Co.*, 111 Pac. 573 (Wash. 1910).

Emerson Mfg. Co. v. *Rustad*, 120 N. W. 1094.

Sheppard v. *Daniel Miller Co.*, 68 S. E. 451.

Sheffield v. *Whitfield*, 65 S. E. 807.

Booth v. *Irving Exchange Natl. Bank*, 82 Atl. 652.

McConnon & Co. v. *Laursen*, 135 N. W. 213.

Furst Mfg. Co. v. *Black*, 111 Ind. 308; 12 N. E. 504.

III.

THE DOCTRINE OF NOTICE OF ACCEPTANCE IS NOT APPLICABLE TO BONDS OF INDEMNITY OR TO ANY FORM OF INSTRUMENT WHICH IS AN ORIGINAL UNDERTAKING.

A BOND OF INDEMNITY OR OTHER ORIGINAL UNDERTAKING WHEN EXECUTED, DELIVERED AND ACTED UPON BECOMES EFFECTIVE.

Haupt v. *James & Cravens Co.*, 120 S. W. 541.

McIntosh Huntington Co. v. *Reed*. 89 Fed. Rep. 464.

Newcomb Bros. Wall Paper Co. v. *Emerson*, 46 N. E. 1018; 17 Ind. App. 482.

Wise v. *Miller*, 45 Ohio State Rep. 388; 14 N. E. 218.

Hall v. *Weaver*, 34 Fed. 104.

Lane v. *Mayer*, 44 N. E. (Ind.) 73.

Bruce v. *Lambour*, 49 So. Rep. 659 (127 La. 969).

Haywood v. *Townsend*, 38 N. Y. Supp. 517.

Singer Mfg. Co. v. *Freerks*, 98 N. W. 705.

Lachman v. *Block*, 15 So. Rep. 649 (46 La.).

Swope v. *Forney*, 17 Ind. 385.

Saint v. *Wheeler & Wilson Co.*, 95 Ala. 362; 10 So. 539.

Fidelity Mut. Life Ins. Co. v. *Stegall*, 111 Pac. 389.

Wheeler v. *Rohrer*, 52 N. E. (Ind.) 780.

Page v. *White Sewing Machine Co.*, 34 S. W. (Tex.) 988.

White Sewing Machine Co. v. *Powell,* 74 S. W. (Ky.) 746.

Engler v. *Fire Insurance Company,* 46 Md. 322.

Walker v. *Brinkley,* 42 S. E. (N. C.) 333.

Klosterman v. *Olcott,* 41 N. W. (Neb.) 250.

Fiala v. *Ainsworth,* 88 N. W. 135 (Sup. Ct. of Neb. 1901).

Bank of the U. S. v. *Dandridge,* 12 Wheat. 64.

Bird v. *Washburn,* 10 Pick. 223.

Boyd v. *Agricultural Ins. Co.,* 76 Pac. 986.

IV.

IT IS NOT NECESSARY THAT THE INDEMNITORS SHOULD RECEIVE ANY BENEFIT AS A CONSIDERATION TO RENDER THEM LIABLE. THE LIABILITY INCURRED BY THE INDEMNITEE AND THE HARM AND INJURY SUFFERED BY IT CONSTITUTE A VALID AND SUFFICIENT CONSIDERATION FOR THE BOND OF INDEMNITY.

Chapin v. *Merrill,* 4 Wend. 657.

Emerson v. *Slater,* 22 Howard, 28 at page 43.

ARGUMENT.

I.

THIS INSTRUMENT SUED ON IN THIS CASE IS A BOND OF INDEMNITY AND NOT A CONTRACT OF GUARANTY. THERE IS A GENERIC AS WELL AS A HISTORIC DISTINCTION BETWEEN BONDS OF INDEMNITY AND CONTRACTS OF GUARANTY.

(*a*) *A bond of indemnity is an engagement "to secure or save harmless against loss or damage of a specified character," it is "something given to a person to prevent his suffering damage"; while "a guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable for such payment or performance."*

As appears from the certificate of the Circuit Court of Appeals, it is not denied by the defendants in error that "they signed and sealed the indemnity bond" sued on "for the purposes therein expressed and authorized Dooling to deliver it to the" plaintiff in error "through its Springfield agent." The bond was so delivered and the plaintiff in error afterwards "in reliance upon Riefler and Hall's indemnity bond executed the Dooling official bond as surety." The sole point raised by the defendants in error is that they are not liable upon

their bond of indemnity because the plaintiff in error did not serve notice upon them that it had accepted their bond and would act in reliance upon it. As a corollary to this defense they urge that the instrument sued on is not a bond of indemnity but a contract of guaranty.

The questions certified to this court therefore involve elementary principles as to the *nature* of the instrument sued on by the plaintiff in error (*a*) whether it is a bond of indemnity or a contract of guaranty, or (*b*) whether it is neither, but a mere *offer* to become indemnitors, or (*c*) an *offer* of guaranty (which latter would require notice of acceptance by the plaintiff in error).

The instrument sued on is undoubtedly in the form of a common law bond of indemnity, but the defendants in error contended in the Circuit Court of Appeals that it is not a bond of indemnity but a contract of guaranty and that it is not even a completed contract of guaranty but a mere offer.

In the light of what we understand to be the true principles of law governing the rights of the parties to this instrument it is of the utmost importance that the question whether the instrument is a *common law bond* of *indemnity* or a *commercial contract* of *guaranty* be first determined, because we believe that if this court adopts the view (which we believe to be the correct one) that the instrument is *not* a *contract* of *guaranty* but a *bond* of *indemnity* the second question as to the necessity for giving notice is practically answered.

In other words, it is our view that the determination of the fundamental character of the instrument

will determine the question whether notice of acceptance was necessary in accordance with the well known doctrine recognized by this court in *Davis* v. *Wells and Davis Sewing Machine Co.* v. *Richards.*

In making this assertion we do not wish to be understood as urging that it is not necessary that there should be an *offer and acceptance* in order to constitute any complete and binding contract, and we do not contend that a bond of indemnity or a surety bond is an exception to this rule; but we contend that the rule as to *offer* and *acceptance* is the same in the case of a bond of indemnity or bond of suretyship, as it is in the case of a mortgage, deed, or any other instrument of that character (except that it is less strict and more informal), and that the doctrine of *notice of acceptance* (as that doctrine is recognized in *Davis* v. *Wells, Davis Sewing Machine Company* v. *Richards,* and numerous other decisions) is one peculiarly adapted to, and applicable to *contracts* of *guaranty alone.*

It is for this reason that we have concluded that the nature of the instrument as belonging to the one class or the other is of vital importance and this is our apology for devoting perhaps more space to the consideration of the essential elements and distinctive features of the two classes of contracts than would seem justifiable in this court upon a question of horn book law. As to the nature of the instrument and the transaction in which it was given, the situation seems to us an exceedingly simple one. The transaction is no different in its nature from the usual case of a surety who before executing a bond (as surety) requires counter indemnity.

Frank E. Dooling having been elected to an office (recorder of a lodge) was required to give a bond with surety conditioned for the faithful performance of his official duties. He applied to the plaintiff in error to sign as his surety and it refused to do so (unless indemnified).

The defendants in error thereupon executed the bond in suit and delivered it to Dooling and authorized him to deliver it (for them and on their behalf) to the plaintiffs in error. Dooling did so deliver it and thereupon *in reliance upon that bond of indemnity* the plaintiff in error signed Dooling's official bond as his surety.

How it can be seriously contended now, that that bond of indemnity is not a bond of indemnity but a contract of guaranty, and therefore did not become effective because notice was not served upon the obligors that the obligee accepted their bond and would act in reliance upon it, we cannot appreciate, when the whole transaction is one which it is most usual for the courts to deal with in reference to bonds and contracts of indemnity, and *the one* transaction which may be said to have given birth to contracts of indemnity.

We have (we confess) been unable to realize how (without confusing elementary principles) the rule recognized by this court in *Davis* v. *Wells,* 104 U. S. 159, and *Davis Sewing Machine Co.* v. *Richards,* 115 U. S. 524, as applicable to certain contracts of guaranty, could be transposed and ingrafted upon common law bonds of indemnity.

The rule as to notice referred to in the certificate

of the Court of Appeals is one almost universally recognized in the United States and also in England (though not quite to the same extent) as one applicable to certain commercial contracts of guaranty, but the most patient and exhaustive research on our part has failed to reveal a single case in the books in which the rule as to notice of acceptance there referred to has been applied to bonds or contracts of indemnity (or suretyship) or indeed to any other instrument except that class which, having its origin in the Law Merchant, has peculiar reasons for the application of the rule.

It will hardly be seriously questioned, we think, that the instruments which were before the court in *Davis* v. *Wells* and *Davis Sewing Machine Company* v. *Richards* were purely contracts of guaranty in the strict sense in which that term is used and within the meaning of the definitions of a contract of guaranty found in all of the books.

If more convincing proof than the instrument itself is required to demonstrate this the discussion in the court's opinion of "overdrafts," "unconditional guaranties," etc., and the following language of Mr. Justice MATTHEWS,

> "that the contract of guaranty * * * is to be construed *as a mercantile instrument* in furtherance of its spirit and liberally, *to promote the use and convenience of commercial intercourse*"

would seem to leave no room for doubt on this point.

This court in deciding *Davis* v. *Wells* and *Davis Sewing Machine Company* v. *Richards*, while it departed slightly from the rule recognized at that time by the English courts, adhered strictly to the doc-

trine which, up to that time, had been recognized by a number of courts in the United States.

Both prior and subsequent to the decisions of this court in those cases, the courts of last resort in the United States have almost universally recognized and applied the doctrine of notice of acceptance (as applied to certain classes of contracts of guaranty) as this court applied it in those cases.

The same courts, however, which have recognized and applied this rule as to notice of acceptance in construing certain contracts of guaranty, have both previously, contemporaneously with, and subsequently to their decisions in those cases declined to apply the doctrine of notice of acceptance to bonds of indemnity and suretyship and other instruments not contracts of guaranty; nor as stated, has our research developed a single decision in which the doctrine of notice of acceptance has been applied by any court in the United States to bonds of indemnity or suretyship, or, in other words, to contracts which were in their nature original undertakings as distinguished from collateral undertakings or guaranties.

A study of the text books, encyclopedias and digests reveals that while that doctrine is elaborately commented upon and discussed in relation to contracts of guaranty, nevertheless when the subject of indemnity or suretyship is treated, they are silent upon the subject of notice of acceptance as constituting a necessary element to create liability.

A consideration of the distinctive features of the two classes of contracts asserted in Point I of our

brief leads us first to the definitions of the two classes of contracts, and then the distinctions between them.

DEFINITIONS OF CONTRACTS OF INDEMNITY.

In 16 Am. and Eng. Ency. of Law, second edition, page 168, title, "INDEMNITY CONTRACTS," we find:

> "I. DEFINITION AND NATURE. An indemnity contract is an agreement between two parties whereby one agrees to indemnify and save harmless the other from loss or damage in connection with some particular transaction, or to protect him against liability to or the claim of a third person."

(This definition is adopted by Black's Law Dictionary.)

> "II. WHAT CONSTITUTES. In order that a contract may be considered one of indemnity the intention of indemnifying against a certain loss or liability must appear."

In 22 Cyc. of Law and Procedure, pages 79 to 80, title, "INDEMNITY," we find:

> "A DEFINITION. In a broad and general sense indemnity is that which is given to a person to prevent his suffering damage. More specifically it may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit."
>
> "C. DISTINGUISHED FROM GUARANTY AND SURETYSHIP. Contracts of indemnity are distinguished from those of guaranty and suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation which he has incurred or is about to incur to a third person, and is not as

in guaranty and suretyship a promise to one to whom another is answerable."

In 20 Cyc. of Law and Procedure, page 1402, title, "GUARANTY," under the sub-head, "DISTINGUISHED FROM OTHER CONTRACTS," we find the following:

> "While guaranty is a branch of suretyship, the two subjects have many distinguishing features. A surety is primarily liable on his contract from the beginning; his obligation springs out of no breach or condition; but the liability of the guarantor is fixed only by the happening of the prescribed condition at a time after the contract itself is made."

And in a note on page 1402 we find:

> "INDEMNITY DEFINED. To indemnify is to secure or save harmless against loss or damage of a specified character which may happen in the future; to compensate or reimburse one for a loss previously incurred. Bouvier L. Dict. An indemnity is something given to a person to prevent his suffering damage. *Peck* v. *Wakely*, 2 McCord (S. C.) 279."

In Brandt on Suretyship and Guaranty, third edition, Vol. I, Section 5, we find:

> "CONTRACTS OF INDEMNITY. Contracts of suretyship and guaranty are both to be distinguished from contracts of indemnity. In a contract of indemnity the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person or against loss resulting from such liability. THE CONTRACT OF AN INDEMNITOR IS AN ORIGINAL UNDERTAKING."

In *Vandiver* v. *Pollak*, 107 Ala. 547, 19 So. Rep. 180, the court said:

> "Indemnity springs from contract expressed

or implied, and in a general way may be defined as the obligation or duty resting on one person to make good any loss or damage another has incurred while acting at his request or for his benefit."

In Pingrey on Suretyship in Section 382 the writer says:

"A contract of indemnity is not a contract with the creditor to answer for the default or miscarriage of the debtor, but is independent of the principal contract or obligation and constitutes an *entirely distinct and separate undertaking with which the creditor has nothing to do.*"

DEFINITIONS OF CONTRACTS OF GUARANTY.

In 14 Am. and Eng. Ency. of Law, page 1128, title, "GUARANTY," we find:

"I. DEFINITION. A guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable to such payment or performance."

And on page 1130 we find:

"DISTINGUISHED FROM INDEMNITY. A contract of indemnity is readily distinguishable from a contract of guaranty, the latter being a collateral undertaking, and the former an original one not within the statute of frauds."

An on the same page we find:

"DISTINGUISHED FROM SURETYSHIP. The contract of a guarantor is collateral and secondary, and in that respect differs from the contract of a surety, which is a primary obligation."

In Cyc. of Law and Procedure, Vol. 20, page 1397, title "GUARANTY," we find:

> "A guaranty is a collateral undertaking by one person to be answerable for the payment of some debt or the performance of some duty or contract for another person who stands first bound to pay or perform."

The distinctions made in the books between a *guarantor* and a *surety* are also of interest and some value in this connection, although it should be borne in mind that the word "surety" is used not only to indicate the liability of a signer of a bond under seal but also as to simple contracts to indicate a direct and primary liability as distinguished from the indirect or secondary liability of a guarantor.

In Pingrey on Surety and Guaranty (by D. H. Pingrey, Esq., of the Illinois bar), we find:

> "Section 4. DISTINCTION BETWEEN SURETYSHIP AND GUARANTY. The distinction between the obligation of suretyship and guaranty, is that the surety undertakes to pay if the principal does not; while the guarantor undertakes to pay if the principal cannot; that is, if he is insolvent and unable to pay. The surety is directly liable to the creditor for the act to be performed, while the guarantor is liable only for the ability of another to perform this act. The undertaking under suretyship is immediate and direct that the act shall be done; if not done, the surety becomes at once responsible. In the case of guaranty, non-liability of the debtor; that is, his insolvency, must first be shown before the guarantor becomes liable."

In *McIntosh-Huntington Co.* v. *Reed*, 89 Fed. 464, the following definition of the distinction between

the contract of a guarantor and that of a *surety* is given by BUFFINGTON, Circuit Judge.

> "The surety undertakes to pay if the debtor does not, while the guarantor undertakes to pay if the debtor cannot."

In the syllabus of this case it is stated that:

> "A written instrument reciting that, for the purpose of obtaining credit with a manufacturing company for a third person, the maker guarantees the amount of such a third person, within certain limits as to time and amount and agrees on demand to pay any balance unsettled on a certain date, is a contract of suretyship, and not of guaranty; and on its delivery by the beneficiary, and the extension of credit by the payee, the maker became absolutely and directly liable to the payee for any balance due on the date named, without notice of its acceptance by the payee."

The learned circuit judge also says in the opinion:

> "*Kramph* v. *Hatz*, 52 Pa. St. 529, draws the distinction between a surety and a guarantor. A surety undertakes to pay if the debtor does not, while a guarantor undertakes to pay if the debtor cannot. In *Reigart* v. *White*, *id.* 440, it is stated that in suretyship there is a direct liability to the creditor for the act to be performed, while a guaranty is a liability only for the ability of another to perform this act. In *Seltzer* v. *Greenwald*, 2 Wkly. Notes Cas. 395, it is well said: 'A suretyship is a direct contract to pay the debt of another. It insures the particular claim.'"

In *Saint* v. *Wheeler & Wilson Company*, 95 Ala. 362, 10 So. 539, the Supreme Court of Alabama, speaking of the distinction between guarantors and *sureties*, says:

> "The distinction between the two classesof un-

dertakings is often shadowy, and often not observed by judges and text writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or do any other act in the event their principal fails therein, they are sureties; but, if they assure the performance only in the event the principal is unable to perform, they are guarantors. Or yet, another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor cannot. The first is sponsor absolutely and directly for the principal's acts; the latter, only for the principal's ability to do the act. 'The one is the insurer of the debt; the other, an insurer of the solvency of the debtor.' This is the essential distinction."

In *Lane* v. *Mayer*, 44 N. E. (Ind.) 73, the Supreme Court of Indiana said (discussing guaranty and suretyship):

> "The distinction between a contract of guaranty and one of suretyship has been so often stated that it is unnecessary to repeat it here. *Shearer* v. *R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455; *Bryant* v. *Stout* (Ind. App.), 44 N. E. 68. A contract, although purporting to be a guaranty, may be so worded as to make it an original undertaking. * * * If the instrument is an original undertaking it became binding upon delivery and no notice of acceptance was necessary."

It seems clear to us that the definition of indemnity in 22 Cyc., p. 80, par "C" fits the case at bar:

> "* * * In indemnity contracts the engagement (of Riefler and Hall) is to make good and save another (United States Fidelity and Guaranty Co.) from loss upon some obligation which he has incurred or is about to incur to a third person." (Court of Honor.)

(*B*) *Bonds of indemnity are original and primary obligations not within the statute of frauds; while contracts of guaranty are secondary or collateral undertakings and are within the scope of the statute.*

The above distinction between the two classes of contracts is important because it shows the essential difference in their inception, and also the different effect given to them when construed in reference to the statute of frauds.

In 14 Am. and Eng. Ency. of Law, second edition, page 1130, under the title "GUARANTY," we find:

> "DISTINGUISHED FROM INDEMNITY. A contract of indemnity is readily distinguished from a contract of guaranty, the latter being a collateral undertaking, and the former an original one not within the statute of frauds."

In 16 Am. and Eng. Ency. of Law, page 169, title, "INDEMNITY CONTRACTS," we find:

> "The decided preponderance of authorities is in support of the view that an indemnity contract is an original and not a collateral undertaking and, therefore, not within the provisions of the statute of frauds. That a promise to answer for the debt, default or miscarriage of another must, in order to be valid, be in writing."

In 20 Cyc. of Law and Procedure, page 1402, title,

"GUARANTY," sub-head "DISTINGUISHED FROM OTHER CONTRACTS," we find:

> "B. INDEMNITY. There are important differences between a contract of guaranty and one of indemnity. The former being a collateral undertaking presupposes some contract or transaction as principal thereto; while a contract of indemnity is original and independent, to which there is no collateral contract and with respect to which there is no remedy against the third party. As contracts of indemnity are not required by the statute of frauds to be in writing, while contracts of guaranty must be evidenced by a sufficient writing in order to be enforcible, the courts have been frequently called upon to determine whether parol contracts belong to the one class or to the other."

In 22 Cyc. of Law and Procedure, page 80, title, "INDEMNITY," we find:

> Par. E. "ORIGINAL AND NOT A COLLATERAL UNDERTAKING. The promise in an indemnity contract is an original and not a collateral undertaking."
>
> "PAROL CONTRACTS. As a general rule a contract of indemnity is not within the statute of frauds and need not be in writing."

In *Hawes* v. *Murphy*, 191 Mass. 469, 78 N. E. 109, the plaintiffs brought an action to recover money paid by them as sureties in a bond signed by them as sureties with one Thomas F. Hill as principal to Charles H. Hanson as obligee; that before the signing or execution of the bond by the plaintiffs as sureties the defendant requested them to sign and execute it, and in consideration thereof orally agreed to save them harmless from all loss on account thereof. LATHROP, J., said in part:

"The defendant requested the judge to rule as follows:

"'(1) That the execution of the bond in question by Hill as principal, and the plaintiffs as sureties, made Hill primarily liable to the sureties for any damage they might sustain by reason of signing of the bond; and this defendant's alleged promise of indemnity, if made, was merely collateral and so within the statute of frauds, and this defendant is not liable thereon.

"'(2) If the plaintiff signed the bond in question, relying in part upon the responsibility of Hill, the principal in the bond, and in part on the alleged oral promise of indemnity by the defendant, the defendant's alleged promise, if he made it, was collateral and within the statute of frauds, and defendant is not liable thereon.'

"The judge refused to give these instructions.

"The case was submitted to the jury, to which no exceptions were taken. The jury returned a verdict for the plaintiffs for the full amount claimed.

"The only questions of law argued by the defendant are to the refusal to give the instructions requested.

"1. The first instruction requested could not have been given. The defendant's promise to the plaintiffs was not 'a special promise to answer for the debt, default or misdoings of another' within the statute of frauds (Rev. Laws, c. 74, Sec. 1, cl. 2), but was an original promise to save the sureties harmless from all loss on account of their signing as sureties, if the jury believed the testimony of the plaintiffs. This question was submitted to the jury with appropriate instructions. *Colt* v. *Root*, 17 Mass. 229; *Weld* v. *Nichols*, 17 Pick. 538; *Chapin* v. *Lapham*, 20 Pick. 467; *Preble* v. *Baldwin*, 6 Cush. 549; *Aldrich* v. *Ames*, 9 Gray, 76; *Perkins* v. *Littlefield*, 5 Allen 370; *Collins* v. *Pratt*, 181 Mass. 345, 63 N. E. 946."

In *Spurrier* v. *Nottingham*, 7 Ky. Law Reports 453, it was held that a promise to save one harmless, if he will become the surety of another, is not such as is required by the statute of frauds to be in writing, and it is immaterial whether the surety commits himself to the payment of a certain amount or the extent of his liability cannot be stated, as in the case of a sheriff's bond.

In *Campbell* v. *Pucket*, 1 Posey Unrep. Cas. 465 (Tex., 1880), a verbal promise to indemnify the promisee if he will become surety on the appeal bond of a third person is not within the statute of frauds.

In *Hartley* v. *Sandford*, 48 Atl. 1009, 66 N. J. Law 40, the full opinion of the Supreme Court of New Jersey is as follows:

> "GUMMERE, J. This case was tried at the April term, 1900, of the Passaic Circuit Court. The action was brought upon a verbal promise upon the part of the defendant, made to the plaintiff, that if he (the plaintiff) would join as surety in a bond given by the defendant's son, Jacob, to one Morehouse to secure the payment of a debt of said son's to Morehouse, and should afterwards be compelled to pay any money in consequence of such obligation, he (the defendant) would repay him. The plaintiff had a verdict, and the question certified is whether the promise sued upon is valid and enforceable against the defendant, or whether it is not rather such a special promise to answer for the debt, default or miscarriage of another person as the statute of frauds (Gen. St., p. 1603, Sec. 5) declares shall not, unless evidenced by writing be the subject of an action. At the term at which this case was argued, we had occasion to consider, in the case of *Warren* v. *Abbett* (N. J. Sup.), 46 Atl. 575, the question whether a prom-

ise by one person to indemnify another for becoming an accommodation indorser for a third is a promise to 'answer for the debt, default, or miscarriage of another.' The conclusion reached was that, under the previous adjudications of our courts, such a promise was an original undertaking, and not within the statute of frauds, and that, consequently, it would support an action, although not in writing. The view expressed in the case cited must control in the determination of that now under consideration. The Circuit Court is advised that the verbal promise of the defendant to indemnify the plaintiff for becoming surety upon the bond of the former's son, Jacob, was a valid and enforceable agreement, and that the plaintiff is entitled to judgment upon his verdict."

In *Fidelity & Casualty Company* v. *Lawlor,* 64 Minn. 144, 66 N. W. 143, the facts are shown in the following extract from the opinion of the court:

"Buck, J. On or about the 6th day of August, 1891, the Cargill Elevator Company, intending to employ one W. L. Lawlor as its agent in receiving grain at its elevator and warehouse at Kindred, N. D., for one year, beginning on the 5th day of August, 1891, the Fidelity & Casualty Company of New York, for a consideration paid to it, gave a bond of indemnity to the Cargill Elevator Company against all acts involving fraud or dishonesty on the part of said Lawlor. To indemnify the Fidelity & Casualty Company for its liability incurred by giving such bond, the defendant, W. L. Lawlor, as principal, and the appellant and another person as sureties, on the 19th day of August, 1891, executed a counter bond to the Fidelity & Casualty Company, which is set forth in the complaint in full, and which indemnifies the Casualty Company for its liability incurred by giving such bond."

After discussing the question whether certain extensions of the counter indemnity bond operated to continue it in full force and effect, the court continued:

> "The defendants' promise to indemnify the plaintiff against loss by becoming responsible for Lawlor's faithful performance of his duty to the elevator company is not within the statute of frauds. *Goetz* v. *Foos*, 14 Minn. 265 (Gil. 196); Browne, St. Frauds, 161, 162."

In *Bonebright* v. *Pease*, 3 Mich. 318, the Supreme Court of Michigan said:

> "Neither on the argument, nor in the subsequent examination of this case, have the court been able to discover any errors in the proceedings or decree of the court below.
>
> "*The agreement of the defendants* to pay the outstanding debts of the old firm of Sutherland, Denio & Co. in its legal effect, *is a mere undertaking on their part, to indemnify the complainant against those debts*, and so the agreement has been treated, as well in the draft of the bill as in the argument of the case, and yet the complainant does not pretend, by any allegation contained in his bill, that he has ever, in any way, been damnified in the least.
>
> "But if he had been, for aught that is averred or charged to the contrary, he has a full and adequate remedy at law."
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> • • • • •
>
> "*The statute of frauds cannot therefore apply as contended by the counsel for the defendant, although the agreement was in parol.* The demurrer was properly sustained and the bill dismissed by the court below for want of jurisdiction."

In the cases of *Horn* v. *Bray*, 51 Ind. 555, and *Anderson* v. *Spence*, 72 Ind. 315, the Supreme Court of

Indiana considered this question with great care and reviewed the authorities at great length.

In *Horn* v. *Bray,* the party who was surety for the maker of a note procured others to sign as sureties by promising to indemnify them and save them harmless, and it was held that such a promise was an original undertaking not within the statute of frauds, and might be proved by parol. The court said:

> "There is much conflict in the adjudged cases as to whether a contract for indemnity between sureties is within the statute of frauds. The earliest English case bearing upon the question is that of *Winckworth* v. *Mills,* 2 Esp. 484, decided at *nisi prius,* where it was held that where a person signed a note at the request of another upon a promise of indemnity, the promise was within the statute, as it was an agreement to answer for the debt and default of another. The next case is that of *Thomas* v. *Cook,* 8 B. & C. 728, where it was held that a promise of indemnity was an original contract between the parties, and hence was not within the statute. But in the subsequent case of *Green* v. *Cresswell,* 10 A. & E. 453, in the same court, *Thomas* v. *Cook* was overruled, and the opposite rule was announced. We make the following extract from a note to the case of *Bessig* v. *Britton,* published in two Cent. Law Journal, 296, in reference to the two English cases last cited:
>
> "'Passing now to the law as it stands on the other side of the water, it is to be remarked that some of the English judges have, for some time, been casting doubts upon the case of *Green* v. *Cresswell,* 10 A. & E. 453; for in speaking of the same in *Batson* v. *King,* 4 H. & N. 739, POLLOCK, C. B., says: "I do not think that the case itself was rightly decided." Besides, a new distinction has been pointed out in the somewhat recent case of *Cripps* v. *Hartnoll,* 4 Best & S. 414, decided in the Exchequer Chamber, and re-

versing the judgment rendered in the same case in the Queen's Bench. "But," says the same learned baron, in referring to *Green* v. *Cresswell*, "there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be." * * * "This view of the subject creates, I think, a broad distinction between the present case and *Green* v. *Cresswell*, which we are not called upon either to overrule, or to say that we entirely support." WILLIAMS, J., in the same case, begins his opinion by saying: "I ought to remark that I do not deem it at all necessary for us to say whether the case of *Green* v. *Cresswell* is good law or not, but I think there is a distinction between the recognizance of bail in a civil suit and the recognizance given for the appearance of a defendant in a criminal proceeding." The court rendered judgment for the plaintiff, holding in effect that the promise of the defendant to indemnify the plaintiff against whatever damage the latter might incur by becoming bail for a third person, was an original undertaking and not collateral, there being no implied promise upon the the part of the person bailed to indemnify his bail in a criminal proceeding.'

"In Alabama and in North and South Carolina and Ohio, the rule laid down in *Green* v. *Cresswell, supra*, has been followed. *Brown* v. *Adams*, 1 Stew. 51; *Draughan* v. *Bunting*, 9 Ired. 10; *Simpson* v. *Nance*, 1 Speers, 4; *Martin* v. *Black's Ex'rs*, 20 Ala. 309; *Easter* v. *White*, 12 Ohio St. 219.

"In the recent case of *Bessig* v. *Britton, supra,* the Supreme Court of Missouri followed the English rule as laid down in *Green* v. *Cresswell, supra.*

"In *Chapin* v. *Merrill,* 4 Wend. 657, the case of *Thomas* v. *Cook, supra,* was followed. In *Kingsley* v. *Balcome,* 4 Barb. 131, *Green* v. *Cresswell* was followed. But in *Barry* v. *Ransom,* 12 N. Y. 462, *Mallory* v. *Gillett,* 21 N. Y. 412, and *Konitzky* v. *Meyer,* 49 N. Y. 571, it was held that where one party, at the request of another, enters into a contract as his surety, the law implies a promise of indemnity; and that an express promise to indemnify is an original undertaking, and need not be in writing. In *Mallory* v. *Gillett, supra,* the ruling in *Kingsley* v. *Balcome, supra,* is expressly disapproved of.

"In Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia, Kentucky, Missouri and New Jersey, it has been uniformly held that a promise of indemnity is an original undertaking, and not within the statute of frauds. *Taylor* v. *Savage,* 12 Mass. 98; *Aldrich* v. *Ames,* 9 Gray 76; *Harris* v. *Brooks,* 21 Pick. 195; *Chapin* v. *Lapham,* 20 Pick. 467; *Blake* v. *Cole,* 22 Pick. 97; *Hendrick* v. *Whittemore,* 105 Mass. 23; *Smith* v. *Sayward,* 5 Greenl. 504; *Holmes* v. *Knights,* 10 N. H. 175; *Cutter* v. *Emery,* 37 N. H. 567; *Whitehouse* v. *Hanson,* 42 N. H. 9; *Hodges* v. *Hall,* 29 Vt. 209; *Keith* v. *Goodwin,* 31 Vt. 268; *Adams* v. *Flanagan,* 36 Vt. 400; *Byers* v. *McClanahan,* 6 Gill & J. 250; *Jones* v. *Shorter,* 1 Kelly 294; *Dunn* v. *West,* 5 B. Mon. 376; *Lucas* v. *Chamberlain,* 8 B. Mon. 276; *Jones* v. *Letcher,* 13 B. Mon. 363; *Melms* v. *Werdehoff,* 14 Wis. 18; *Apgar's Adm'rs* v. *Hiles,* 4 Zab. 812; *March* v. *Consolidation Bank,* 49 Penn. St. 510; *Kelly* v. *Gillespie,* 12 Iowa 55."

In *Anderson* v. *Spence,* 72 Ind. 315, a person verbally agreed to indemnify another against all loss

if he would enter into a recognizance for the appearance of "C," who was under indictment for a felony. It was held that such an agreement was an original promise and not within the statute of frauds, and that the promisee might recover upon such a verbal agreement whatever loss he might sustain by reason of "C's" forfeiture of the recognizance. In a learned opinion discussing this question, the court said:

> "The second proposition involves an inquiry into the nature of the oral agreement upon which appellee relies. If it is an original agreement, it is not within the statute; if a collateral one, it is. The great weight of authority is, that an original agreement is not within the statute, although it may directly concern a third person, or relate to the performance of some act by one not a party to the contract. *Thatcher* v. *Rockwell*, 4 Col. 375; *Edenfield* v. *Canady*, 60 Ga. 456; *Hartley* v. *Varner*, 88 Ill. 561; *John* v. *Knapp*, 36 Iowa 616; *Smith* v. *Cramer*, 39 Iowa 413; *Lester* v. *Bowman*, 39 Iowa 611; *Emerson* v. *Slater*, 22 How. 28; *DeWolf* v. *Rabaud*, 1 Pet. 476; *Morrison* v. *Baker*, 81 N. C. 76; *Spooner* v. *Dunn*, 7 Ind. 81; *Crawford* v. *King*, 54 Ind. 6; *Billingsley* v. *Dempewolf*, 11 Ind. 414; *Carpenter* v. *Davis*, 6 Blackf. 367; *Nelson* v. *Hardy*, 7 Ind. 364; *Beaty* v. *Grim*, 18 Ind. 131."
>
> "There is, in principle, an obvious and important difference between a contract of guaranty and one of indemnity. The former is a collateral undertaking and presupposes some contract or transaction to which it is collateral. *Dole* v. *Young*, 24 Pick. 250; Story on Promissory Notes, Sec. 457; *McMillan* v. *The Bull's Head Bank*, 32 Ind. 11; *Gaff* v. *Sims*, 45 Ind. 262; *Dickinson* v. *Colter*, 45 Ind. 445; *Taylor* v. *Taylor*, 64 Ind. 356, 359."
>
> "The English cases have not been at all har-

monious. The old case of *Winckworth* v. *Mills*, 2 Esp. 484, held that a promise of indemnity was within the statute, but in *Thomas* v. *Cook*, 8 B. & C. 728, the contrary doctrine was declared. *Thomas* v. *Cooke* was, in turn, overruled in *Green* v. *Cresswell*, 10 A. & E. 453. For a long time the doctrine of *Green* v. *Cresswell* has been viewed with disfavor, and it was, long before its overthrow, often severely censured, notably so in the cases of *Batson* v. *King*, 4 H. & N. 739, and *Cripps* v. *Hartnoll*, 4 Best & S. 414. After a long struggle, the doctrine of *Green* v. *Cresswell* was directly overthrown in *Reader* v. *Kingham*, 13 C. B., n. s. 344. In the later case of *Wildes* v. *Dudlow*, L. R., 19 Eq. Cas. 198, *Reader* v. *Kingham* is expressly approved, the court saying that the case of *Thomas* v. *Cook*, 8 B. & C. 728, was decided, 'upon the plainest princiles of common sense and justice.'

"While the doctrine of *Green* v. *Cresswell*, *supra*, was still recognized as the law of England, the courts declared that there was an important and broad distinction between the undertaking as surety in civil cases and that as bail in criminal proceedings. This doctrine is stated with clearness and force by POLLOCK, C. B., in *Cripps* v. *Hartnoll*, 4 Best & S. 414 (116 Eng. C. L. 116). This learned judge, after speaking of *Green* v. *Cresswell*, *supra*, said: 'But there is a great distinction between that case and the present. Here the bail was given in a criminal proceeding; and, where bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and, with respect to the person who bails, there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be. Now it has been laid down that a mere promise of indemnity is not within the statute of frauds,

and there are many cases which would exemplify the correctness of that decision.' The English cases, therefore, establish a rule which would take the present case out of the statute, even though it be conceded that the doctrine of *Green* v. *Cresswell* should be deemed the correct one. We confess, however, that it seems to us that there was a real conflict between the doctrine of *Green* v. *Cresswell* and that of *Cripps* v. *Hartnoll*, and that the distinction attempted to be made by the latter case was simply an effort to get rid of an unsound doctrine without expressly overruling it. *Green* v. *Cresswell* was always in conflict with the English cases, and there are many of them holding, to borrow the language of the cases, 'That the debt or default must be toward the promisee.' *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Fitzgerald* v. *Dressler*, 7 C. B., n. s. 374. There is no 'debt or default towards the promisee' in cases where one person becomes bail for another at the request of a third. In such a case, it is impossible to conceive a debt or default as existing toward the promisee.

"Long before the final overthrow of *Green* v. *Cresswell*, many, indeed most, of the American courts had accepted the doctrine, which, indeed, had never been directly challenged, either in England or America, that the debt or default must be towards the promisee, and had carried it to its logical conclusion. There are, however, many American cases holding to the doctrine of *Green* v. *Cresswell*, some of them somewhat extending it. With the downfall of the original case, the doctrine which it declared, always plainly erroneous upon principle, must, in time, be repudiated by all the courts of the land.

"In *Aldrich* v. *Ames*, 9 Gray 76, SHAW, C. J., speaking for the court, held an oral promise of indemnity made to one to induce him to become bail for another to be good. In *Holmes* v. *Knights*, 10 N. H. 175, an oral promise to indemnify a plaintiff, if he would become bail for

a third person, was held not to be within the statute. Cases are cited in *Horn* v. *Bray*, from the reports of Massachusetts, Pennsylvania, Iowa, Maine, New Hampshire, Vermont, Maryland, Georgia and Kentucky, showing that a contract to indemnify is not within the statute; and to these may be added *Vogel* v. *Melms*, 31 Wis. 306; *Shook* v. *Vanmater*, 22 Wis. 532; *Reed* v. *Holcomb*, 31 Conn. 360; *Sanders* v. *Gillespie*, 59 N. Y. 250; *Green* v. *Brookins*, 23 Mich. 48; *Stocking* v. *Sage*, 1 Conn. 519. The general doctrine, that a promise to indemnify the promisee for becoming surety for a person other than the promisor is not within the statute, is approved by many of the text-writers. 3 Pars. Con., 6th ed., 21 n; Roberts on Frauds, 223; 1 Hilliard Con. 384, Sec. 11, 385, Sec. 12; Throop Verbal Agreements, Sec. 361."

In *Minick* v. *Huff*, 59 N. W. 795, 41 Neb. 516, the court said (RAGAN, C. J.):

"Perhaps no statute ever enacted has been so often before the courts as this statute of frauds. And the cases that have arisen, and in which the courts have been called upon to say whether the promise made came within the statute, are as various as the transactions of human affairs. Perhaps no general rule can be laid down that will afford a safe and correct test in all cases as to whether a promise is or is not within the statute, and no such attempt will be made. The weight of authority, however, in this country sustains this rule: that the verbal promise of A. to B. to indemnify him if he will become surety for C. for a debt of the latter to D. is not a promise on the part of A. to answer for the debt of C., and not within the statute. The following cases, and perhaps others sustain the rule stated: *Sanders* v. *Gillespie*, 59 N. Y. 250; *Yale* v. *Edgerton*, 14 Minn. 194 (Gil. 144); *Goetz* v. *Foos*, 14 Minn. 265 (Gil. 196); *Horn* v.

Bray, 51 Ind. 555; *Mills* v. *Brown*, 11 Iowa 314; *Garner* v. *Hudgins*, 46 Mo. 399; *Vogel* v. *Melms*, 31 Wis. 306; *Green* v. *Brookins*, 23 Mich. 48; *Potter* v. *Brown*, 35 Mich. 274; *Perley* v. *Spring*, 12 Mass. 296; *Chapin* v. *Lapham*, 37 Mass. 467; *Aldrich* v. *Ames*, 9 Gray 76; *Apgar's Adm'rs* v. *Hiler*, 24 N. J. Law 812. These cases followed the doctrine of the English case. *Thomas* v. *Cook*, 8 Barn. & C. 728. On the other hand, such a promise is held to be within the statute in *Easter* v. *White*, 12 Ohio St. 219; *Kelsey* v. *Hibbs*, 13 Ohio St. 340, and these cases, and others like them follow the doctrine of the English case, *Green* v. *Cresswell*, 10 Adol. & E. 453. We think the cases first above cited as sustaining the rule are in accord with the weight of authority, both in this country and in England, and we cheerfully follow those cases."

In *Jones* v. *Shorter*, 1 Ga. 294, 44 Am. Decisions 649, it was held that where a person promised to indemnify another against loss for becoming surety upon an administration bond, the promise was an original undertaking and not within the statute of frauds when the promisee induced by such promise became a surety. The court said:

"Respecting the first promise, we are of the opinion tha it is not within the statute of frauds. Mr. Roberts in his treatise on this statute, says, 'that the principal point to be ascertained is, whether or not the party, who is to be benefited by the promise, is liable at all for this, is implied in the very notion of a collateral promise. If there is no such liability, there is nothing to which the new promise can be collateral, or in relation to which it can be regarded as an undertaking to answer for the debt, default or miscarriage of another. It must, therefore, without such liability in a third person, be an original undertaking in the party promising.'

Tested by this rule, the promise of Shorter is clearly an original undertaking, and so not within the statute of frauds. And this conclusion is equally well warranted upon the authority of the cases in the books. It would be misspending time to go through the whole of them.

"In *W. Thomas* v. *William Cook*, 8 Barn. & Cress. 728, BAYLEY, J., says: 'Here the bond was given to Morris, as the creditor; but the promise in question was not made to him. A promise to him would have been, to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall either within the words or the policy of the statute of frauds.' PARKE, J.: 'This was not a promise to answer for the debt, default or miscarriage of another person, but an original contract between these parties, that the plaintiff should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing; and this case is in substance the same.'

"In *Chapin* v. *Merrill*, 4 Wend. 657, the court says: 'This action is brought on the parol undertaking of the defendant to save the plaintiff harmless. This is clearly an original undertaking, and is not within the statute of frauds. It was held by Lord Hardwicke in the case of *Tomlinson* v. *Gill*, Amb. 330, that if the consideration of the promise take its root in a transaction distinct from the original liability, the case is out of the statute. This proposition is illustrated by the case in which it is laid down, and by the case of *Read* v. *Nash*, 1 Wils. 305. In the first case, Gill promised the widow and administratrix of an estate, that, if she would permit him to join with her in letters of admin-

istration, he would make good any deficiency of assets to discharge the intestates; in the second, a third person and stranger to a suit for a battery promised the plaintiff that if he would withdraw his record, and proceed no further, he would pay him fifty pounds. The person making this promise, which was not in writing, was held liable.' It would be unprofitable to multiply decisions upon this point."

In *Lucas* v. *Chamberlain,* 8 B. Monroe 276, the plaintiff brought an action upon an alleged parol promise of one Lucas to indemnify them for becoming sureties on Stephens in an injunction bond to enjoin further proceedings on a judgment. It was held, first, that the incurring of responsibility at the request of another is in itself a sufficient consideration to support a promise of indemnity. Second, that a promise of indemnity to one, if he will become a surety for a third person, is an original promise not within the statute of frauds. The court said:

"His promise to indemnify the plaintiff for entering into the injunction bond, is in no sense to be regarded as a promise to pay the debt of another, within the statute of frauds. And even if he had been an entire stranger to the debt, his promise to indemnify the plaintiffs for becoming sureties to third persons was an original promise not within the statute, and, therefore, enforcible, though not evidenced by writing, as was expressly decided in the case of *Dunn* v. *West* (5 B. Monroe 381)."

And in *Dunn* v. *West,* 5 B. Monroe 376, the court said:

"But without pursuing this illustration, we think the question now before us has been substantially decided by the Supreme Court of New York in the case of *Chapin* v. *Mevill* (4 Wendell

657), where that court decides that the promise of one person to indemnify another for becoming security for a third is an original undertaking, not within the statute of frauds, and enforcible though not made in writing. The same principle is in effect admitted or decided in the case of *Ward* v. *Tryer's Executrix* (19 Wendell 494), and by the Supreme Court of Massachusetts in *Blake* v. *Cole* (22 Pickering 97). The same principle is stated in a note to Chitty on Contracts, 5th American edition, page 516, where these and several other cases which we have not examined are referred to.

"Upon the authority of these cases, therefore, and because there was no debt from the plaintiff's son to West, which the plaintiff promised to pay in default of payment by his son, but the promise was to pay to West what he should have to pay if he would become surety for the son, we are of opinion that the statute of frauds does not apply to the case, and that the promise is enforcible by action, and, therefore, by way of set-off to the note in writing."

And to the same effect is *George* v. *Hoskins*, 30 S. W. 406 (Court of Appeals of Kentucky, 1895).

In *Perley* v. *Spring*, 12 Mass. 297, the opinion which is brief, is in part as follows:

"PARKER, C. J.: The question presented in this case requires a construction of the statute against frauds and perjuries not before expressly given; but clearly deducible from pre-existing decisions in regard to the operation of that statute.

"Here the plaintiff was induced to become surety for a debtor in prison, upon the promise of the defendant to indemnify him. He has been obliged to pay a considerable sum of money in consequence of his suretyship, and he calls upon the defendant to perform his promise.

"Surely nothing could be more just or reason-

able, than that the law should coerce the performance of such a contract. But still the public convenience, which caused the adoption of the statute against frauds and perjuries, does sometimes prevent a recovery upon promises clearly proved by parole, but which are not proved by some writing signed by the party to be bound. And if it clearly appears that the promise declared on in this case is such an one as the legislature intended should be proved by writing only, the action must fail.

"The words of the statute are: 'No action shall be brought, whereby to charge the defendant upon any special promise to answer for the debt, default or misdoings of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.'

"The uniform construction, given by the English courts and adopted by ours, as to that branch of the statute which relates to debts, has been to consider the provision as applicable only to pre-existing debts of a third person; which are considered as not furnishing a sufficient consideration for a parole promise. Indeed the consideration may be said to be passed when the promise is made; so that some new consideration, such as forbearance, release from arrest, etc., may be necessary to support such a promise.

"But when the promise is prospective, to pay the debt of another, which may accrue in consequence of the very promise which is made, this is considered as not affected by the statute. The consideration is then co-existing with the promise; and it is the original debt of the party making the promise. This doctrine seemed to be admitted by the counsel for the defendant; and as no debt existed at the time of the promise, they suggested that this was a

promise for the default or misdoings of another, and so was within the statute.

"But perhaps the same reason applies as to debt. Here was no actually existing default or misdoing at the time of the promise; but the promise was to indemnify against a future default or misdoing; in consequence of which the plaintiff became surety. This was a good and valuable consideration; and it is not a case within the statute. It is an original, and not a collateral promise."

In *Aldrich* v. *Ames,* 9 Gray (75 Mass.), page 76, the opinion of the court is in full as follows:

"SHAW, C. J. The case comes before us nominally as upon a bill of exceptions taken by the defendant at the trial in the court of common pleas; but the bill of exceptions has been so much modified by the consent of parties with special agreements, that it is in effect an agreed statement of facts, upon which the court is to enter judgment.

"The case in substance is, that the plaintiff, at the request of the defendant, and for a valuable consideration, became bail for John A. Crehore, upon which the defendant promised the plaintiff to indemnify and save him harmless.

"The ground of defense is, that this was an alleged promise of the defendant to pay the debt of another, and therefore that the action cannot be maintained without an agreement in writing, because it is within the statute of frauds.

"The court are of opinion that this ground is wholly untenable. This is a promise by the defendant to another, to pay his debt, or, in other words, to save him from the performance of an obligation which might result in a debt. But is a promise to the debtor to pay his debt, and thereby to relieve him from the payment of

it himself, which is not within the statute of frauds.

"The theory of the statute of frauds is this: that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For instance, if A., a debtor, owes a debt to B., and C. promises B., the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case, should C., on good consideration, promise A., the debtor, to pay the debt to B. and indemnify A. from the payment, although one of the results is to pay the debt to B., yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt.

"This rule appears to us to be well settled as the true construction of the statute, well confirmed by authorities. *Eastwood* v. *Kenyon,* 11 Ad. & El. 438, and 3 P. & Dav. 276; *Harrison* v. *Sawtel,* 10 Johns. 242; *Chapin* v. *Merrill,* 4 Wend. 657; *Chapin* v. *Lapham,* 20 Pick. 467; *Alger* v. *Scoville,* 1 Gray 395."

In *Smith* v. *Delaney,* 64 Conn. 264, 29 Atl. 496, the facts as stated in the opinion are:

"On the 10th day of November, 1890, William McGee, of Bristol, in said county, defendant, as principal, and the plaintiff, as surety, signed a license bond for $300 to the treasurer of said county. The plaintiff executed said bond at the request of the defendant Delaney, who said to the plaintiff, as an inducement to execute said bond, 'I will see you all right.'"

The court (FENN, J.) said:

"The main inquiry, upon the facts found, is whether the contract therein stated is within

the statute of frauds. The law upon this subject, namely, whether contracts of indemnity are special promises to answer for the default or miscarriage of another, or are original undertakings, has been correctly said (8 Am. & Eng. Enc. Law., p. 673) to be 'in a state of hopeless confusion, arising almost wholly from the different views taken of the scope of the statute. Where *Thomas* v. *Cook,* 8 Barn. & C. 728, in law, and the statute is confined to contracts of suretyship, results are reached entirely different from those obtained where *Green* v. *Cresswell,* 10 Adol. & E. 453, is followed, and contracts of indemnity are included in its scope.' In favor of the view of *Green* v. *Cresswell,* that contracts of indemnity are within the statute, the case of *Nugent* v. *Wolfe,* 111 Pa. St. 471, 4 Atl. 15, cited by the defendant, and in favor of the opposite view, held in *Thomas* v. *Cook,* the case of *Davis* v. *Patrick,* 141 U. S. 487, 12 Sup. Ct. 58, cited by the plaintiff, may be regarded as among the leading authorities. Doubtless, in England, the later case of *Green* v. *Cresswell* has been practically overruled and the authority of *Thomas* v. *Cook* fully restored. *Wildes* v. *Dudlow,* L. R. 19 Eq. 198; *Wagon Co.* v. *Maclure,* 19 Ch. Div. 478. *Thomas* v. *Cook* is also followed in a majority of the American states. Browne, St. Frauds, Sec. 161c."

In *Boyer* v. *Soules,* 105 Mich. 31, 62 N. W. 1000, LONG, J., said:

"But, aside from the consideration of the security which Soules had, the promise was not a collateral one, and therefore not within the statute of frauds. It was an original undertaking to save the plaintiff harmless. A promise by one person to indemnify another for becoming a guaranty for a third is not within the statute of frauds. Such promise need not be in writing, and the assumption of the responsibility

is a sufficient consideration for the promise. *Chapin* v. *Merrill*, 4 Wend. 657."

In *Resseter* v. *Waterman*, 151 Ill. 169, Mr. Justice SHOPE said (page 179):

"The principle under consideration is illustrated by Mr. Bishop (Law of Contr., Sec. 1265), as follows: 'One's promise to another to see him harmless, should he become surety for a third person, or should he do anything else, is a mere arrangement between promisor and promisee. It is to pay what the one to whom it is made may become liable for, * * * not "another's" debt, but his. Therefore, it is not within the statute, and is valid though oral. * * * On principle, this question is determinable by a very simple test. You promise James, that, if he puts his name, as surety for John, on a bond running to Richard, you will hold him harmless; he does it; John makes default. All agree that in this case John is the "another" of the statute. But Richard, to whom the debt is due, cannot sue you; John failing, his claim over is alone on James. Aside from difficulties as to the form of the action, your liability begins only when James has paid him. There remains now for adjustment only what you had promised to James, who is not "another," but the promisee himself, the debt is yours to him and there is nothing going out from you to any third person. Hence, the case is not within the statute.'"

In the light of these decisions construing contracts similar in character and given under similar circumstances we do not see how it can be doubted that the instrument before this court is one of indemnity. *If it had been a verbal undertaking by Riefler and Hall it would have been valid under these decisions. It is manifest that if Riefler and Hall had approached the*

Springfield agent of the plaintiff in error and requested of him that the company execute Dooling's bond and had then stated to him verbally the exact language of the instrument before the court they could have been held liable. If this is true it conclusively demonstrates that the instrument is an original undertaking and not a guaranty.

(C) A GUARANTEE MUST ORDINARILY EXHAUST HIS REMEDIES AGAINST THE PERSON PRIMARILY LIABLE BEFORE RESORTING TO HIS GUARANTOR; BUT AN INDEMNITEE CAN HOLD HIS INDEMNITOR WITHOUT FIRST SEEKING REIMBURSEMENT FROM ANY THIRD PERSON.

We realize that the above statement so far as it relates to contracts of guaranty, is subject to many modifications or rather exceptions. Contracts of guaranty in most cases are made either with reference to the extension of credit upon an open account or with reference to negotiable instruments.

This is true because the contract itself was the outgrowth of such transactions between merchants.

Guaranties of negotiable instruments are of course divided into different classes entailing slightly different liabilities and rights, as guaranties of payment, guaranties for collection, etc. *Getty* v. *Schautz*, 100 Fed. Rep. 577. They are usually classified into general or special, limited or continuing, absolute or conditional. Pingrey Suretyship, Sec. 340.

Consequently the rule as above stated cannot be said to apply to all guaranties of negotiable instruments, but the rule does correctly state the procedure required to be followed by a guarantor of ordi-

nary commercial credits as accounts for the sale of merchandise, etc.

The rule is thus stated in *Page* v. *White Sewing Machine Company*, 34 S. W. (Tex.) 988:

> "The difference between a contract of guaranty and one of suretyship is not always clearly marked or well defined. In And. Law Dict., p. 497, the difference is thus stated: 'A contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, whereas a guaranty is a liability only for his ability to perform this act. A surety assumes to perform the contract for the principal debtor, if he should not. A "guarantor" undertakes that his principal can perform; that he is able to perform. The undertaking of a surety is immediate and direct—that the act shall be done, and, if not done, then he is to be responsible at once; but, from the nature of the undertaking of a guarantor, non-ability (insolvency) must be shown.' 'A guarantor insures the solvency of the debtor.' A surety insures the debt itself."

In 20 Cyc. of Law & Procedure, pages 1446 and 1453, this subject is fully discussed.

On page 1446 it is said:

> "Looking alone to the nature of the contract of guaranty and to the elements which distinguish it from a contract of suretyship, the conclusion seems to follow that the liability of the guarantor is not determined by the single fact of the default of the principal debtor, but that the creditor should use every effort to collect the debt from the latter, and on his failure, should carefully inform the guarantor thereof." * * *

In *Reigart* v. *White*, 52 Pa. St. 438, it was held that an undertaking of guaranty is an engagement to pay on a debtor's insolvency, if due diligence be used

to obtain payment; that in suretyship, the surety assumes to perform the contract of the principal, if he should not. In a contract of guaranty, the guarantor undertakes that the principal is able to perform.

Indeed, the defendants in error recognize this to be true, and in their brief filed in the Circuit Court of Appeals, contended that inasmuch as the instrument in the case at bar is a contract of guaranty, *it was the duty of the plaintiff in error to exhaust its remedies against Dooling before it could enforce their bond!*

> Brief of Defendant in Error, pages 9, 31, 32.

Of course, this argument is specious:

> *Conery* v. *Canon*, 26 La. Ann. 123.
>
> *Kempton* v. *Coffin*, 29 Mass. (12 Pick.) 129.
>
> *City of Springfield* v. *Boyle*, 164 Mass. 591, 42 N. E. 333.

But it shows the conclusion to which one is brought by treating the instrument as a contract of guaranty.

On the other hand, it is not necessary in a contract of indemnity that the indemnitee should exhaust his remedies against any third person before seeking to enforce the liability of the indemnitor.

In 22 Cyc. of Law and Procedure, page 102, title, "INDEMNITY," CONDITIONS PRECEDENT TO RECOVERY, it is said:

> "In the absence of express agreement, it is NOT a condition precedent to recovery on a contract of indemnity that the indemnitee should

> first seek reimbursement for the damages sustained from the third person liable to him, and this has been held, although the indemnitor might have no remedy over against such third person."

And in *Springfield* v. *Boyle,* 164 Mass. 591, 42 N. E. 333, the court said:

In consideration of the City of Springfield issuing a license to occupy part of a street in front of property where it was erecting a building, a person executed an agreement providing that the society should comply with the terms of the license and indemnify the city against loss by reason of its occupancy.

> "The plaintiff plainly was under no obligation to attempt to collect of the society the amount which it had been forced to pay in consequence of the defect in the sidewalk. It had a right to rely upon the agreement which it had taken for the express purpose of protecting itself against such a liability, and that right was not affected or impaired by the fact that the defendant's testator might have no remedy over against the society. If he had wished to provide for that contingency, something concerning it should have been inserted in the agreement."

In *Conery* v. *Canon,* 26 La. Ann. 123, a judgment was rendered in the United States District Court against a steamboat and against the captain as principal and the sureties on the release bond. The captain desired that an appeal be taken, and requested the plaintiff, who was one of the sureties on the release bond, to sign the appeal bond as surety.

To induce the plaintiff to sign such appeal bond, the defendants gave a bond, the condition of which

was to hold the plaintiff harmless against any and all liability on the release bond and the appeal bond, and to refund to him any sum which he should be compelled to pay by reason of the release bond or the appeal bond, etc.

It was held that the plaintiff (the surety on the two bonds and the indemnitee in the bond of indemnity given by the defendants) was not compelled to exhaust all recourse against the principal on the release bond before bringing suit on the indemnity bond.

In *Kempton* v. *Coffin*, 29 Mass. (12 Pick. 129), where a defendant agreed to indemnify a plaintiff for one-fourth of any loss which should accrue to him by reason of his endorsing certain notes, and if the maker failed to pay them and the plaintiff should not be compelled to, the defendant agreed to pay one-fourth part of them as they became due and remained unpaid by the maker, and the plaintiff paid the same after notice to him as endorser, it was held that the plaintiff could maintain his action against the defendant on his indemnity bond before bringing suit against the maker of the notes, and it was not necessary to show that the maker of the notes was unable to pay.

What is said as to the liability of an indemnitor is also true of a surety. A creditor need not before suing a surety exhaust his remedy against the principal, even though the principal is solvent.

And in this respect the surety's undertaking also differs from that of a guarantor.

De Colyer on Principal and Surety, page 147.

(D) AN INDEMNITEE MUST HAVE ACTUALLY PAID A JUDGMENT OR GIVEN HIS OWN OBLIGATION TO THE CREDITOR WHICH HAS BEEN ACCEPTED AS PAYMENT BEFORE HE CAN MAINTAIN AN ACTION UPON THE INSTRUMENT OF INDEMNITY; WHILE A GUARANTEE MAY MAINTAIN AN ACTION AGAINST A GUARANTOR TO COMPEL PAYMENT OF THE DEBT ITSELF AS STATED IN POINT (C).

This is, of course, fundamental, and we merely refer to it as one distinguishing feature of the two classes of contracts.

In *Central Trust Company* v. *Louisville Trust Company*, 100 Fed. 545, 40 C. C. A. 530 (Circuit Court of Appeals of the Sixth Circuit), the opinion rendered by Mr. Justice LURTON (then Circuit Judge) discusses the question whether an indemnitee in an instrument of indemnity can maintain a bill in equity to compel payment before the complainants had actually paid the claim itself, and held that no action in equity is maintainable in advance of the payment by the indemnitee. It is, of course, true that under certain circumstances a surety can maintain a bill in equity against his principal to compel payment or exoneration before the surety has actually paid the amount, but the opinion above referred to points out that this is not true where the relation and the liability is created by and dependent upon an instrument of indemnity.

In *Ressiter* v. *Waterman*, 151 Ill. 169, at page 177, the Supreme Court of Illinois said:

> "No express agreement, that Severson should save harmless his surety, is shown or pretended. And while he might properly be regarded

as under an implied obligation to indemnify his surety, he was not bound to do so. Neither at law nor in equity was such implied obligation susceptible of being enforced; no bill would lie to compel performance, nor action for damages for its non-performance. Upon this implied obligation the surety, *after discharging the indebtedness, would have his action over against his principal.* It is manifest, and requires no citation of authority to show, that the only obligation upon the part of Severson was that arising by operation of law, to *reimburse and make good to his surety the amount expended in payment of his debt. It is a familiar rule, that the surety can maintain no action against his principal until he pays the debt.* In the absence of express agreement, his only remedy, then, would be assumpsit for the money actual paid and interest. And even where the principal has expressly promised to indemnify and save his surety harmless, the latter can maintain no action on the promise, unless he can show that he has given his own notes or made other like arrangements equivalent to payment of the indebtedness. (3 Pars. on Contr., 186, 187, notes.)"

This rule of law, however, is so well known we think counsel for defendants in error will hardly question it, and we do not wish to take the time of the court to quote from any more opinions. The authorities cited in our brief, however, will be found, upon examination, to sustain the doctrine.

(E) WHILE A GUARANTOR'S UNDERTAKING IS FOR THE BENEFIT OF THE CREDITOR, THE UNDERTAKING OF A SURETY'S INDEMNITOR IS NOT. A CREDITOR CANNOT MAINTAIN ANY ACTION UPON IT.

This is also a proposition of law that is self-evi-

dent and requires no argument. The specific point is discussed by VAN FLEET, District Judge, in *United States* v. *United Surety Company*, 192 Fed. p. 992. In that case a contractor (Stanley Construction Co.) entered into a contract with the United States Government for the construction of certain public works, executing a contractor's bond in accordance with the Act of Congress of February 24, 1905, with United Surety Company as surety. An indemnity bond was executed by James Stanley *et al.* to the United Surety Company to indemnify it for executing as surety the bond of the Stanley Construction Company. The plaintiffs, who were creditors of the Stanley Construction Company, sought to enforce liability on the indemnifying bond, and the court said:

> "These facts do not disclose a cause of action against the defendants named. Neither the United States, the contractor, nor Wood, the party in whose behalf this action is brought, is a party to the indemnity contract, nor is anything alleged to show any privity between those parties and the defendants who executed it; while the instrument discloses upon its face that it was an indemnity given by third parties solely for the protection of the surety company."

The doctrine is also mentioned by Mr. Justice Shope in *Resseter* v. *Waterman*, 151 Ill. 169 at 179.

(F) AS A GENERAL RULE AN "INDEMNITOR" IS NEITHER A "GUARANTOR" NOR A "SURETY." HE IS A "PRINCIPAL," ALTHOUGH HE IS FREQUENTLY REFERRED TO BY THE COURTS AS A SURETY.

It is hardly necessary for us to advert to the origin of contracts of indemnity. As is well known, such

contracts were originally created by implication by the English Court of Chancery, and arose from the equitable obligation of a principal to reimburse, indemnify and protect his surety. The earliest known case is *Ford* v. *Stobridge,* decided by Lord COVENTRY in 1632 (Nelson Chancery, 24) in which the plaintiff was surety for the defendant, and having no counter bond, brought his bill to recover against the principal and the court awarded him a decree.

In *Appleton* v. *Bascom,* 3 Met. 169 (Mass. 1841), WILD, J., said:

> "And we think it is well settled, that when a surety becomes bound for his principal and at his request, the law implies a promise of indemnity by the principal to the surety to repay the latter all the money he may be compelled to pay the creditor in consequence of his assumed liability. So the law is laid down in *Wood* v. *Leland;* and so it was decided in *Gibbs* v. *Bryant,* in *Toussaint* v. *Martinnant,* in *Howe* v. *Ward* and in many other cases. In *Gibbs* v. *Bryant* there has been given a written promise of indemnity, and the court say that 'the written contract produced contained nothing more than what the law would imply.' And so the law has been well settled for a long time, although in ancient times no action at law could be maintained where a surety had paid the debt of his principal; the only remedy being to be had in a court of equity. But very many equity principles have been adopted by courts of law in modern times allowing actions to be maintained or implied promises by the party to do what justice and equity require to be done, where there is no express contract."

When a person signs a bond as surety at the request of others who agree to indemnify him against loss, the indemnitors are considered in the light of

principals, even though they may not be the *actual* principals in the bond signed by him as surety, and may be properly termed *quasi*-principals.

In *Wise* v. *Miller,* 45 Ohio State Rep. 388, 14 N. E. 218, certain stockholders of a company entered into an agreement to indemnify certain sureties against all loss and damage sustained by them on account of endorsing the company's paper. The court said:

> "Recognizing this, 'in consideration of the mutual benefit derived by the stockholders of the company by reason of the indorsement of its paper,' they bound themselves to Miller that they would protect him against loss and damage sustained by such indorsements. By their covenant of indemnity to Miller, who on the faith of it indorsed the paper of the company for their mutual benefit, they expressly created an obligation like that which the law implies on the part of every principal, and his relation to them, if not strictly that of a surety, is analogous to it, giving rise to corresponding rights and remedies. The engagement of every principal is to indemnify and protect his surety. This is implied from the relation of principal and surety, which generally arises when one becomes bound at the request and for the benefit of another. A surety, it is said, 'is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor or wholly unknown.' *Smith* v. *Sheldon,* 35 Mich. 42. The chief difference between the ordinary case of

> principal and surety, and the one we are now considering, consists in the mode in which the relation is established. *Here the stockholders who signed the agreement expressly assume the position of principals, stipulate in terms to protect and indemnify their surety,* and agree among themselves upon the proportion of the liability each shall discharge."

This decision is interesting because the court in analyzing the liability of the defendants, discusses the distinction between a contract of guaranty and one of indemnity *as bearing upon the question of the necessity of notice of acceptance. The defendants in that case* (as in the case at bar) *sought to escape liability by claiming that their undertaking was one of guaranty, and that, therefore, notice of the acceptance of the contract of guaranty should have been given to them. The court, however, held that the contract was not a contract of guaranty, but one of indemnity, and that, therefore, no notice of acceptance was required to be given them.* Upon this question WILLIAMS, J., speaking for the Supreme Court of Ohio, said:

> "The two propositions upon which the plaintiff in error asks the reversal of the judgments below are embraced in his exceptions to the report of the referee, and briefly stated are: (1) That Wise, having received no notice of the acceptance of the contract of guaranty, never became liable to the plaintiff; and (2) that some of the notes indorsed by Miller were renewed after the defendant notified him, on the 26th of October, 1875, that he would stand responsible for no liabilities thereafter created, and as to such he was discharged from his obligation. *Both of these propositions are based upon the hypothesis that the contract is purely one of guar-*

anty, and that the defendant sustains no relation to the plaintiff but that of a guarantor. Whether this be the true conception of the agreement will be considered hereafter.

(2) But is the undertaking of the defendant simply that of a guarantor? He and his coobligors were the stockholders of the corporation, and indirectly, at least, liable on its indebtedness to an amount equal to their stock; they were beneficially interested in its credit, and the property thereby obtained, and it was to their mutual advantage to advance its prosperity and develop its purposes."

Then follows the further statements in the court's opinion as to the nature of a contract of indemnity and the relation of quasi-principal created by a contract of indemnity, which we have already quoted above. We shall refer to this case on this point more fully under a later head in our argument.

(G) HISTORICALLY, CONTRACTS OF INDEMNITY ARE CREATIONS OF THE COMMON LAW AND ARE USUALLY SPECIALTIES (EXCEPT THE IMPLIED OBLIGATION CREATED BY LAW ON THE PART OF A PRINCIPAL TO INDEMNIFY HIS SURETY WHEN NO EXPRESS OBLIGATION HAS BEEN GIVEN). WHILE CONTRACTS OF GUARANTY ARE COMMERCIAL CONTRACTS HAVING THEIR ORIGIN IN THE RULES OF THE LAW MERCHANT AND ARE USUALLY SIMPLE CONTRACTS. FOR THIS REASON THE TWO CLASSES OF INSTRUMENTS ARE CONSTRUED ACCORDING TO DIFFERENT RULES.

As we have already stated, the contract of indemnity had its inception in the implied obligation of a principal to save harmless and re-imburse his surety created first by courts of equity (*Ford* v. *Stowbridge*, Nelson's Chancery, 24); and afterwards

enforced by courts of law (*Appleton* v. *Bascom*, 3 Metcalf 160).

In *Courtis* v. *Dennis*, 7 Metcalf 510, the court said:

> "The rules, however, of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant; and the true distinction seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsible; and his contracts are often specialties; while a guarantor is only liable where default is made by the party whose undertaking is guaranteed; and his agreement is one of simple contract."

This language is quoted with approval in Brandt on Suretyship & Guaranty, in paragraph 1 and by Deady, District Judge, in *Hall* v. *Weaver*, 34 Fed. 104.

As is well known, the rule applied in construing the liability of a surety or indemnitor upon a writing obligatory, is that all presumptions are indulged in his favor and his liability is never extended by implication. On the other hand, most of the courts in construing guaranties construe them most strongly against the guarantor; that is, they are given a liberal construction.

In Daniels on Negotiable Instruments, paragraph 1755, the writer says:

> "Some of them incline to construe the guaranty most strongly against the guarantor on the ground that the words of an instrument are to be taken most strongly against the party using them."

In the same paragraph, the writer, referring to the nature of the contract of guaranty, says:

> "On the other hand, as guaranties are con-

tracts of extensive use in the commercial world, upon the faith of which large credits and advances are made, care should be taken to hold the party bound to the full extent of what appears to be his engagement. Letters of guaranty are commercial instruments, generally drawn up by merchants, sometimes inartificial and often loose in their structure and form. They should not, therefore, be construed with nice and technical care; but according to the facts and circumstances accompanying the transation, holding in view as the main object to ascertain and effectuate the intentions of the parties."

In *Bell* v. *Bruen*, 1 Howard 169, Mr. Justice CATRON said:

"The adjudged cases referred to, giving a construction to bonds with conditions, and contracts made directly between debtor and creditor, afford little aid in arriving at the true understanding of a commercial guarantee. Bonds, etc., are entered into with caution, and often after taking legal advice; they contain the entire contract, beyond which the courts rarely look for circumstances to aid, in their construction. And if there be sureties bound by them, and the meaning is doubtful, the construction is restricted, and made most favorable to the sureties. Such is the result of the authorities cited for the defendant.

On the other hand, letters of guarantee are (usually) written by merchants; rarely with caution, and scarcely ever with precision; they refer in most cases, as in the present, to various circumstances, and extensive commercial dealings, in the briefest and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances, and facts, accompanying the transaction; without referring to which, they could rarely be prop-

erly understood by merchants, or by courts of justice. *The attempt, therefore, to bring them to a standard of construction, founded on principles, neither known or regarded, by the writers, could not do otherwise than produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagement to the same rules of interpretation applicable to bonds, and similar precise contracts. Of the fallacy of which attempt the investigation of this cause has furnished a striking and instructive instance.*"

In *Lawrence* v. *McCalmont*, 2 Howard 426, Mr. Justice STORY said:

"Some remarks have been made on the argument here upon the point in what manner letters of guarantee are to be construed; whether they are to receive a strict or a liberal interpretation. We have no difficulty whatsoever in saying that instruments of this sort ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning; but simply that the words should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed and the purposes to which it is applied. *We should never forget that letters of guarantee are commercial instruments—generally drawn up by merchants in brief language—sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world.*"

In *Edmundston* v. *Drake*, 5 Pet. 624 (1831) Mr. Chief JUSTICE MARSHALL said:

> "It would indeed by an extraordinary departure from that exactness and precision which peculiarly distinguish *commercial transactions*, which is an important principal in *the law and usage of merchants*, if a merchant should act on a letter of this character, and hold the writer responsible without giving notice to him that he had acted on it. The authorities quoted at the bar on this point unquestionably establish this principle."

In *Lee* v. *Dick*, 10 Pet. 482, this language of the chief justice was quoted with approval by Mr. Justice THOMPSON.

In England the distinction between the words "guaranty" and "suretyship" is not maintained with quite the same strictness that has always been observed in the United States. Nevertheless, the distinction is recognized by the courts and text book writers in England.

In "A practical Treatise on the Law of Principal and Surety, Particularly with Relation to Mercantile Guaranties," by William Theobald, Esq., of the Inner Temple (1832), the writer treats in Chapter II of "Mercantile Guaranties, or the Simple Contract of Surety."

In "A Treatise on the Law of Principal and Surety," by Edward D. Pitman, Esq., Barrister at Law, the writer says (page 2):

> "Those instruments which are not under seal are usually termed guaranties."

In *Smith* v. *Dann*, 6 Hill (N. Y.) 543, BRONSON, J., says (p. 545):

> "But guaranties *like other commercial contracts must be construed with reference to the usages of the trade.*"

In an interesting note to *Lanusse* v. *Barker,* 3 Wheaton, on page 148, it is said:

> "Although contracts of guaranty are very familiar in the practice of the commercial world comparatively few cases have been subjected to judicial decision in the English and American tribunals. It may not, however, be without use to the learned reader to collect the principal adjudications on this subject, especially as no attempt has yet been made to bring them before the public in a connected view."
>
> "Contracts of guaranty, like all commercial contracts, have received a liberal interpretation in furtherance of the intention of the parties."

There are numerous other cases in which like references may be found to the commercial character of the contract of guaranty and the different rule of construction applicable to such contracts from the well known rule as to sureties and indemnitors in writings obligatory which are specialties growing out of entirely different transactions, but we do not wish to burden the court further.

In view of the difference in the sources from which the two contracts sprung, and the rules of construction applicable to each, it would seem that there should be little difficulty in distinguishing between a contract of guaranty and one of indemnity. After reading the foregoing quotations from the learned jurists of this court, and studying the instrument in the case at bar, it is difficult to conceive how any one can seriously contend that it is a contract of guaranty.

II.

INSTRUMENTS OF GUARANTY (UNLIKE INSTRUMENTS OF INDEMNITY) ARE DIVIDED INTO TWO CLASSES, (A) OVERTURES OR OFFERS TO GUARANTY (TO WHICH CLASS BELONGS DAVIS SEWING MACHINE CO. V. RICHARDS) AND (B) ABSOLUTE GUARANTIES (TO WHICH CLASS BELONGS DAVIS V. WELLS.)

In Pitman on Principal and Surety (published in 1843), page 28, the writer says:

"1. Of absolute guaranties and propositions tending to guaranties.

The writing or undertaking may be either, 1st, an absolute guarantee; or 2dly, a proposition tending to a guarantee.

1st. When the writing or undertaking is an absolute guarantee, the person receiving such guarantee may act upon it without notifying his intention so to do, to the person giving such guarantee.

The following are examples of absolute guarantees:

'I guarantee the payment of any goods which I. Stadt delivers to I. Nicholls.'

'I hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to I. and E. A. Smee, according to the custom of their trading with you, in the sum of 200L.'

In the former case, the party giving the guarantee will be answerable for the value of all goods delivered to I. Nicholls, until the guarantee is revoked; in the latter case for umbrellas and parasols delivered according to the custom of the trade, in any sum not exceeding 200L.

2ndly. If the writing or undertaking is simply a proposition tending to a guarantee, it must, in order to be converted into an absolute

guarantee, receive the assent of the person to whom it is offered; and such assent (where an assent or acceptance of the proposal is all that is required) must be communicated to the person making the proposition, or some proof given, that the person making such proposition had subsequently consented to its being conclusive as a guarantee; and where the proposition is made subject to any terms or conditions, a strict compliance in every respect with the terms and conditions contained in such proposition is necessary to make it binding."

In DeColyar on Guaranty and Principal and Surety (page 3), the writer says:

"Every contract includes a concurrence of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. Until, therefore, an acceptance be given (which must be an absolute and unqualified acceptance of the previous offer), the promiser is not liable. In accordance with this doctrine, it has been decided that a mere *offer* to guarantee is not binding until *acceptance* by the person to whom the offer is made. Till then it is *revocable* by the party making it. But when an offer is sent by letter it cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive till after the first letter has been received and answered. It is not, as a rule, necessary, however, that the acceptance should be *express;* it may be *implied.* Thus, where an offer of guarantee is in these terms. 'I agree to be security to you for T. C. for whatever, while in your employ, you may trust him with, and, in case of default, to make the same good,' as soon as the person to whom such a guarantee is given employs T. C. (but not before) the guarantee attaches and becomes binding on the party who gave it, without any formal acceptance.

In *Pope* v. *Andrews*, COLERIDGE, J., said: 'If a person offers a guarantee, and more still, if he signs a guarantee by which he makes himself liable, and that be sent to the other party, such other party, if he means not to accept the guarantee, is bound expressly to dissent within a reasonable time; and if he keeps the guarantee an unreasonable time, he is bound to accept it just the same as if he had assented to it by words; and if he has ever accepted it either by *word or by act*, he cannot afterwards retract.'"

In 20 Cyc. of Law and Procedure, page 1404, it is said:

"A mere offer to guarantee the payment of the debt of another does not amount to a guaranty, and before acceptance of the offer it may be revoked as can any other offer."

And on page 1407:

"Both the English and American cases hold generally that the rule requiring notice by the guarantee of his acceptance of the guaranty applies only where the guaranty is in legal effect an offer or proposal. Where the transaction is not merely an offer to guarantee the payment of debts and amounts to a direct promise of guaranty, all that is necessary to make the promise binding is that the promissee should act upon it. He need not notify the promisor of his acceptance."

In 14 Am. & Eng. Ency. of Law, Second Edition, page 1145, it is said:

"NOTICE OF ACCEPTANCE OF GUARANTY. a. NECESSITY OF NOTICE. (1) *Where Guaranty is Absolute.* Where a guaranty is absolute, no notice of its acceptance is necessary to fix the liability of the guarantor, unless notice be made a condition of the guaranty. An absolute guaranty takes effect as soon as it is acted upon, and to

support an action against the guarantor nothing more is necessary to be shown than that the party to whom it is addressed acted upon it."

"(2) *Offers to Guarantee.* Notice of acceptance of a guaranty and of an intention to act under it is required where the instrument is merely an offer or proposition, the acceptance of which by the guarantee constitutes that mutual consent necessary to a contract."

The decisions recognizing and construing these two classes of instruments will be found in 25 Century Digest, Section 9, and 9 Decennial Digest, Section 7. In determining the question in each case whether notice of acceptance is necessary to be given to the guarantor, the courts in the decisions which we shall cite and refer to under sub-heads ("A") and ("B") hold that the question whether notice of acceptance is necessary depends upon whether the instrument is an *absolute* or *completed* guaranty, or whether it is a mere *offer* tending to guarantee, as will be found by referring to the opinions in those cases.

We have cited the numerous authorities under points (A) and (B) following, merely for purposes of comparison and for the information of the court. Our purpose is to show, first, that the doctrine of notice of acceptance *is one which has been applied by nearly all the courts in this country to commercial contracts of guaranty,* and is not a novel doctrine announced only in the cases of *Davis* v. *Wells* and *Davis Sewing Machine Co.* v. *Richards.*

In other words, we wish *Davis* v. *Wells* and *Davis Sewing Machine Co.* v. *Richards* to be viewed in their true perspective; not as announcing a strange

or novel doctrine, but strictly in harmony with the views which had previously been announced by this court in numerous cases. *Russell* v. *Clark*, 7 Cranch 69; *Edmundston* v. *Drake*, 5 Pet. 624; *Douglas* v. *Reynolds*, 7 Pet. 113; *Lee* v. *Dick*, 10 Pet. 482; *Adams* v. *Jones*, 12 Pet. 207; *Reynolds* v. *Douglas*, 12 Pet. 504; and also by nearly all the courts of last resort in the United States. The cases cited under this point of our brief also show, upon examination, that the contracts construed in all of those cases in which the doctrine of notice of acceptance is discussed, are commercial contracts of guaranty.

A. The doctrine that notice of acceptance is necessary to bind a guarantor applies only to instruments which are overtures or offers to guaranty; to this class belongs Davis Sewing Machine Co. v. *Richards*, 115 U. S. 524.

It seems to be entirely reasonable to require that when a person writes a letter offering to guarantee a debt under certain circumstances he should be advised whether his offer is satisfactory or acceptable. Indeed, until the person to whom it is addressed indicates in some manner that it is acceptable or satisfactory, *it is not a guaranty at all; it is nothing but a letter.* As is said in 20 Cyc. of Law & Procedure, 1404, it does not amount to a guaranty at all. It is not a contract, but a mere offer, an expression of willingness to do something, and has not yet taken the form of a contract.

In legal contemplation they are not contracts. They are nothing at all, unless they be mere offers to do something which can be withdrawn at any time before acceptance. There are many reasons why

such offers embodied in letters or memoranda may not be acceptable or satisfactory to the person to whom they are addressed. He is not consulted as to the form of the letter, as to the amount or extent of the liability, nor as to the conditions attached. These may be so worded as to make the letter entirely unsatisfactory to him as an instrument upon which to rely for the extension of credit to another. We cannot help feeling that this situation is entirely different from that in the case of the instrument at bar. The instrument before this court is in the most solemn form known to the law. It is a specialty under seal. Its provisions are carefully drafted, and *were, indeed, drafted by the plaintiff in error.* Therefore, the extent and conditions of the obligation and the amount of the liability were not only known to the plaintiff in error, but were fixed by the plaintiff in error.

CASES IN THIS COURT CONSTRUING OFFERS TO GUARANTY.

As this court decided *Davis* v. *Wells* and *Davis Sewing Machine Co.* v. *Richards,* upon the authority of previous decisions of this court, we shall refer briefly in historical sequence to *all* the cases decided by this court prior to *Davis Sewing Machine Co.* v. *Richards,* in which the letters or instruments of guaranty were held to be *mere offers* requiring notice of acceptance to render the guarantor liable. These are the cases cited in the Davis cases, and we call the court's attention to the significant fact that they were all commercial contracts of guaranty and governed by the customs of the law merchant.

In *Russell* v. *Clark's Executors*, 7 Cranch 69 (decided in 1818), the instruments of credit or guaranty were letters written by a firm in Providence, Rhode Island, to a party in London, and are in the following form:

"PROVIDENCE, 20th January, 1796.

"*Nathaniel Russell, Esq.*

DEAR SIR:

"Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engagement they may enter into with you. The friendship we have for these gentlemen induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit.

We are, with sentiments of esteem,

Dear Sir,

Your most obedient servants,

CLARK & NIGHTINGALE.

PROVIDENCE, 21st July, 1796.

Nathaniel Russell, Esq.

DEAR SIR:

We wrote you yesterday a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also that you will, immediately on the receipt of this, vest the whole of what funds you have of ours

in your hands, in rice on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank until due; or purchase the rice upon a credit, till such time as you are to be in cash for them; the truth is, we expect rice will rise, and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price; our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject.

We are, dear sir,

Your most obedient servants,

CLARK & NIGHTINGALE."

This court, speaking through Mr. Chief Justice MARSHALL, referring to these letters of credit or guaranty between merchants, said:

"The court cannot consider these letters as constituting a contract by which Clark and Nightingale undertook to render themselves liable for the engagements of Robert Murray & Co. to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements."

Here is the earliest expression of opinion by this court upon the doctrine of notice of acceptance of a letter of guaranty, and it should be noted that they were *letters* merely sent by post or otherwise. It was purely a transaction between merchants located at a distance, the plaintiff seeking to recover for amounts paid upon drafts or acceptances made upon the strength of the letters of credit or guaranty referred to.

In *Edmundston* v. *Drake*, 5 Peters 624 (decided in

1831), by Mr. Chief Justice MARSHALL, the doctrine of notice of acceptance of a letter of guaranty was considered, and the rule that notice of acceptance of such a letter was necessary in order to render the writer liable upon it was again recognized.

The letters of guaranty before the court in that case were also *letters* in the strict sense of the term, and the court recognized the fact that it was due to the signer of the letter *by the rules of the law merchant.* In other words, it was treated as a commercial transaction and governed by the rules recognized among merchants. Discussing the question of the necessity for notice, the learned Chief Justice MARSHALL said:

> "It would indeed be an extraordinary departure from that exactness and precision *which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants,* if a merchant should act on a letter of this character, and hold the writer responsible, without giving notice to him that he had acted on it. The authorities quoted at the bar, on this point, unquestionably establish this principle."

In *Douglas* v. *Reynolds,* 7 Peters 113, the instrument before the court was a letter of credit signed by the defendants and addressed to the plaintiffs in the following terms:

> "PORT GIBSON, December, 1827.
>
> *Messrs. Reynolds, Byrne & Co.,*
>
> GENTLEMEN: Our friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or endorsement of his paper, or advances in cash; in order to save you from harm by so doing, we do

hereby bind ourselves severally and jointly, to be responsible to you at any time for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

Your obedient servants,

JAMES S. DOUGLASS,
JOHN G. SINGLETON,
THOMAS GOING."

Mr. Justice STORY says (page 125):

"The second instruction insists, that to entitle the plaintiffs to recover on the guarantee, they must prove, that notice had been given to the defendants of that fact in a reasonable time after the guarantee had been accepted. Whether there was not evidence before the jury sufficient to have justified them in drawing the conclusion, that there was such notice, we do not inquire. It is sufficient for us to declare that in point of law, the instruction asked was correct, and ought to have been given. *A party giving a letter of guarantee has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it, or not.* It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance, in regard to the party in whose favor it is given. Especially it is important in the case of a continuing guarantee, since it may guide his judgment in recalling or suspending it."

In *Lee* v. *Dick*, 10 Peters 482, the instrument was a letter written by Lee of Memphis and addressed to Dick & Co. in New Orleans in the following form:

"GENTLEMEN: Nightingale and Dexter of Maury County, Tennessee, wish to draw on you at six and eight months; you will please accept their draft for $2,000, and I do hereby guaranty the punctual payment of it.

SAMUEL B. LEE."

This letter was delivered to one of the persons whose debt was to be guaranteed, and with it was sent a letter addressed to him in which the writer of the letter says:

> "I, however, send guarantee for $2,000 *which you can use if you choose.*"

Upon the question whether notice of the acceptance of this letter was necessary, Mr. Justice THOMPSON said:

> "Whether N. and J. Dick and Co. were bound to give notice to the defendant that they intended to accept or had accepted and acted upon the guarantee.
>
> A guarantee is a merchantile instrument, and to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety. If the guarantee stood alone, unexplained by the letter which accompanied it, it would undoubtedly be limited to a specific draft for $2,000, and would not cover that amount in a bill for a larger sum; but the letter which accompanied it fully justifies the conclusion that the defendant undertook to guaranty $2,000 in a draft for a larger amount. The letter and guarantee were both written by the defendant, on the same sheet of paper, bear the same date, and may be construed together, as constituting the guarantee."
>
> "The next question is, whether the plaintiffs were bound to give notice to the defendant, that they intended to accept, or had accepted and acted upon this guarantee. It is to be observed, that this guarantee was prospective; it looked to a draft thereafter to be drawn; and this question is put at rest by the decisions of this court." Citing *Russell* v. *Clark's Executors*, 7 Cranch 91; *Edmundston* v. *Drake*, 5 Peters 624.

Referring to the latter case, the court says:

"On the trial, the court was requested to instruct the jury that in order to make the defendant liable to the plaintiff under the contract, they were bound by the law merchant to give him due notice. Upon this prayer the court was divided, and the instruction was not given; and this court decided that the instruction ought to have been given. The court said it would indeed be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions; which is an important principle in the law and usages of merchants; if a merchant should act on a letter of this character and hold the writer responsible without giving notice to him that he had acted on it. The authorities on this point, say the court, unquestionably establish this principle. And again, the case of *Douglass and others* v. *Reynolds and others*, 7 Peters 125, was an action upon a guarantee; and the court was requested to instruct the jury that to enable the plaintiff to recover on the letter of guarantee they must prove that notice had been given, in a seasonable time after said letter of guarantee had been accepted by them, to the defendant, that the same had been accepted. This instruction the court below refused to give; and this court say the instruction asked was correct and ought to have been given. That a party giving a letter of guarantee has a right to know whether it is accepted; and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material not only as to his responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct, and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in case of a continuing guarantee, since it may guide his judgment in recalling or suspending it. This last remark

by no means warrants the conclusion that notice is not necessary in a guarantee of a single transaction; but only that the reason of the rule applies more forcibly to a continuing guarantee. It is unnecessary, after such clear and decided authority in this court on this point, to fortify it by additional adjudications. We are not aware of any conflict of decisions on this point; and if there are, we see no reason for departing from a doctrine so long and so fully settled in this court.

We do not mean to lay down any rule with respect to the time within which such notice must be given. The same strictness of proof is not necessary to charge a party upon his guarantee, as would be necessary to support an action upon the bill itself; when by the law merchant a demand upon and refusal by the acceptors must be proved in order to charge any other party upon the bill."

In this case we hope we may be pardoned for referring to a part of the argument of Mr. Peyton, the counsel for plaintiff in error (page 485) in which he says:

"The plaintiff relies, mainly, on the want of notice; and contends that the defendants were bound to give him notice, first, of the acceptance of the guarantee by the defendants, and that they had or would extend the accommodation on the footing of it, and to what amount he was liable; second, that the defendants were bound, after the payment of the money for Nightingale and Dexter, to make a demand of them for payment, and give notice of such demand and refusal to the plaintiff."

"What is the meaning of this guarantee? If you, Mr. Dick, will accept the draft of the house of Nightingale and Dexter at six and eight months, I will guarantee that you shall be punctually paid the money. Is the plaintiff to remain in ig-

norance of his liability until the draft falls due? Is this responsibility to be sprung upon him by a protest? by the loss of his credit? and without one hour's time to prepare for the shock? It *is a part of the contract itself; it is a well settled principle in 'the law and usages of merchants,' that a party giving such a guarantee has a right to be informed, within a reasonable time, whether it is accepted, and to what extent he is liable.* This knowledge is not a formal matter, but may be, and generally is, most material, not only as to his responsibility, and the necessity of providing the means to meet that responsibility, and save his credit, which is so vitally important to a merchant, but it may be equally important in future proceedings, dealings, etc., between the parties. It may excite him to vigilance in looking to his own final security."

Here is a concise statement not only of the reason for the rule of notice, but also the origin of the rule in the customs and usages of the law merchant, When a person offers to guarantee a debt, there is no contingency about the maturing of the debt. It is bound to mature and must be paid by some one. The only contingency which may arise is the failure of the principal debtor to pay. Therefore a guaranty is like any other mercantile instrument, a draft or bill of exchange which requires acceptance and protest for non-acceptance, so that the parties may know what their liabilities will be and what to expect in the way of meeting maturing obligations.

It is perfectly apparent that none of these considerations apply to a writing obligatory which indemnifies a surety for executing an official bond. There is no debt which is certain to become due. Indeed,

it is the expectation of all the parties that the official will perform his duties and that no one will be called upon to pay anything. There is not the slightest analogy between an indemnity bond of that character and an undertaking by which a merchant guarantees the payment of a debt maturing at a certain definite time; or an uncertain time, but which is bound to mature.

In *Adams* v. *Jones*, 12 Peters 207, the instrument of guaranty construed was in the form of a letter as follows:

> "*Mr. William A. Williams:*
>
> SIR: On this sheet you have the list of articles wanted for Miss Betsey Miller's millinery establishment, which you were so very good as to offer to purchase for her. I will be security for the payment, either to you, or the merchants in New York, of whom you may purchase, and you may leave this in their hands, or otherwise, as may be proper. I hope, to your favor and view, will be added all possible favor by the merchants to the young lady in quality and prices of goods, as I have no doubt she merits as much, by her late knowledge of her business, industry, and pure conduct and principles, as any whatever.
>
> CALVIN JONES."

Upon the trial of the case the question arose "whether the plaintiffs were bound to give notice to the defendant that they had accepted or acted upon the guaranty, and given credit on the faith of it," upon which question the judges being divided, certified the point to this court.

Mr. Justice STORY said:

> "And the question, which, under this view, is presented, is, whether upon a letter of guaranty

addressed to a particular person, or to persons generally, for a future credit to be given to the party, in whose favour the guaranty is drawn, notice is necessary to be given to the guarantor, that the person, giving the credit, has accepted or acted upon the guaranty, and given the credit on the faith of it. We are all of opinion that it is necessary; and that this is not now an open question in this court, after the decisions which have been made in *Russel* v. *Clarke*, 7 Cranch 69; *Edmondson* v. *Drake*, 5 Peters' Rep. 624; *Douglass* v. *Reynolds*, 7 Peters' Rep. 113; *Lee* v. *Dick*, 10 Peters 482; and again recognized at the present term, in the case of *Reynolds* v. *Douglass*. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability; to exercise due vigilance to him; and to avail himself of the appropriate means in law and equity, to compel the other parties to discharge him from future responsibility. The reason applies with still greater force to cases of a general letter of guaranty; for it might otherwise be impracticable for the guarantor to know to whom, and under what circumstances the guaranty attached, and to what period it might be protracted. Transactions between the other parties, to a great extent, might from time to time exist, in which credits might be given, and payments might be made, the existence and due appropriation of which might materially affect his own rights and security. If, therefore, the question were entirely new, we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own."

In *Reynolds* v. *Douglass*, 12 Peters 497, the instrument construed was a letter in the following form:

"PORT GIBSON, 27th December, 1827.

"*Messrs. Reynolds, Byrne & Co.*,

GENTLEMEN: Our friend, Mr. Chester Haring, to assist him in business, may require your

aid from time to time, either by acceptances or endorsement of his paper, or advances in cash. In order to save you from harm in so doing, we do hereby bind ourselves severally and jointly, to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

Your obedient servants,

JAMES S. DOUGLASS,
THOMAS G. SINGLETON,
THOMAS GOING."

The plaintiffs treated this letter as a continuing guaranty, and from time to time on the faith of it accepted drafts, endorsed bills and made advances of money at the request of Haring. Mr. Justice McLEAN said:

"Several instructions were given by the court, at the request of the defendants' counsel, to which the plaintiffs excepted; and we will now consider them.

And first, the court charged the jury, that to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them to the defendants, that the same had been accepted. This instruction, being in conformity to the rule formerly laid down by this court in this case, was properly given. This notice need not be proved to have been given in writing, or in any particular form; but may be inferred by the jury from facts and circumstances which shall warrant such inference.

The court also instructed the jury, that if they believed from the evidence that two of the defendants, Going and Singleton, admitted that the debt sued for was a just debt, and that the said two defendants stated that they would try to arrange the payment thereof, out of the funds or effects that had been assigned by Daniel

Greenleaf to James S. Douglass; and that the admission and declaration were made in 1830, and that at said period no notice had been given by the plaintiffs to the defendants, that said guaranty had been accepted by them; and that said defendants were uninformed at the time of such admission and declaration of such failure to give such notice; that then such admission and declaration do not operate in law a waiver of, and dispense with the necessity of such notice.

This instruction must have been hastily drawn; but we understand it as laying down the principle that a recognition of their obligation to pay, by the defendants, under a supposed liability which did not exist, from the facts of the case, and of which facts they were ignorant; would not be a waiver of the notice. In this view, the instruction was correctly given.

And the court further instructed the jury that in the absence of evidence of notice given in a reasonable time by the plaintiffs, that said letter of credit had been accepted by them, the mere acknowledgment by the defendants, that the debt sued for is a just debt, does not dispense with the necessity of such notice; but that to dispense with such notice, there must be evidence of an express and unconditional promise by the defendants to pay, made under a full knowledge that such notice had not been given.

This instruction is not founded upon the supposition that the defendants were ignorant of the necessity of a notice to bind them; and this ignorance, therefore, cannot be presumed. The proposition then is, that although the defendants knew that a notice was necessary to bind them, and which had not been given, an acknowledgment of the debt and a promise to pay, which is not express and unconditional, would not dispense with notice. In giving this instruction, we think the court erred. A party to a note entitled to notice, may waive it by a prom-

ise to see it paid; or an acknowledgment that it must be paid; or a promise that 'he will set the matter to rights;' or by a qualified promise, having knowledge of the laches of the holder."

These are all of the cases decided by this court in which the question of notice of acceptance is discussed prior to Davis v. *Wells.*

We now come to the cases referred to in the certificate of the Circuit Court of Appeals.

DAVIS V. WELLS, 104 U. S. 159, and
DAVIS V. RICHARDS, 115 U. S. 526.

Read in the light of the previous decisions above referred to, these two cases announce nothing new or novel, but on the contrary, are cases involving instruments which are purely contracts of guaranty and treated as such.

The rule as to notice of acceptance in those cases is announced upon the authority of the previous decisions of this court just cited, viz.: *Russell* v. *Clark,* 7 Cranch 69; *Edmundston* v. *Drake,* 5 Peters 624; *Douglass* v. *Reynolds,* 7 Peters 113; *Lee* v. *Dick,* 10 Peters 482; *Adams* v. *Jones,* 12 Peters 207, showing that the court considered the contracts involved to be governed as are those cases by the customs of the law merchant.

In *Davis* v. *Wells,* the instrument was a *continuing guaranty,* and recited that "this guaranty to be an open one and to continue one at all times to the amount of $10,000, until revoked by us in writing."

Mr. Justice MATTHEWS discusses the distinction between absolute guaranties and mere offers to guaranty, and says (page 166):

"The view we have taken of the rule under consideration, as requiring notice of acceptance and of the intention to act under the guaranty, only when the legal effect of the instrument is that of an offer or proposal, and for the purpose of completing its obligation as a contract, is the one urged upon us by the learned counsel for the plaintiff in error, who says, in his printed brief: 'For the ground of the doctrine is not that the operation of the writing is conditional upon notice, but it is that until it is accepted, and notice of its acceptance given to the guarantor, there is no contract between the guarantor and the guarantee; the reason being that the writing is merely an offer to guarantee the debt of another, and it must be accepted and notice thereof given to the party offering himself as security before the minds meet and he becomes bound. Until the notice is given, there is a want of mutuality; the case is not that of an obligation on condition, but of an offer to become bound not accepted; that is, there is not a conditional contract, but no contract whatever.'"

In this case the court held that the instrument was a completed guaranty and not a mere offer, and that no notice of acceptance was necessary.

On the other hand, in *Davis Sewing Machine Company* v. *Richards,* the court held that the instrument which was in the conventional form of a guaranty *and was not under seal,* was a mere offer of guaranty and, therefore, required notice of its acceptance on the part of the person to whom it was addressed.

Davis v. *Wells* and *Davis Sewing Machine Company* v. *Richards,* when read in the light of previous decisions of this court to which they refer are perfectly lucid and in harmony with the earlier

cases on *commercial guaranties.* We will not therefore extend this brief by an attempt to analyze them, as this court will examine the opinions.

In *Barnes Cycle Co.* v. *Read,* 84 Fed. Rep. 601, BUFFINGTON, District Judge, discusses a writing which is held to be a mere offer and not a completed instrument. The opinion of Judge BUFFINGTON is a well considered one and in accord with the authorities on this subject in reference to commercial guaranties. The instrument was one purporting to guarantee payment of any sums of money which might become due for goods sold to one Schlaudecker.

Judge Buffington cites *Davis* v. *Wells, Davis Sewing Machine Co.* v. *Richards,* and *Coe* v. *Buehler,* 110 Pa. St. 366, 5 Atl. 20, and *Gardner* v. *Lloyd,* 110 Pa. St. 285, 2 Atl. 562.

This case was reversed by the Circuit Court of Appeals for the third circuit (91 Fed. Rep. 481, 33 C. C. A. 646) not on a question of law, but because it found that the guarantor had implied notice sufficient to make the offer effective as a guaranty.

In this connection it is interesting to note that on the same date that Judge Buffington handed down the decision in *Barnes Cycle Co.* v. *Reed,* he also decided *McIntosh Huntington Co.* v. *Reed,* 89 Fed. Rep. 646, construing the instrument before the court, as a *contract of suretyship and not a contract of guaranty* and held that such a contract *did not require notice of acceptance but became effective upon delivery.*

A short time after this he also delivered the opinion of the Circuit Court of Appeals for the third

circuit in *Kent* v. *Silver*, 108 Fed. 365, 47 C. C. A. 404 (affirming *Silver* v. *Kent*, 105 Fed. 840), and held that the instrument in that case was *a completed contract of guaranty and therefore notice of acceptance was not necessary.*

Here are three opinions by the same jurist applying the doctrine of notice of acceptance to the three classes of contract exactly as we believe and contend it should be applied.

The courts of Illinois (where the bond was delivered) follow the rule recognized by this court.

ILLINOIS DECISIONS.

In *Newman* v. *Streator Coal Co.*, 19 Ill. App. 495, the instrument sued on was as follows:

> "CHICAGO, April 17, 1883.
>
> *Streator Coal Company, Streator, Ill.*
>
> GENTLEMEN: I guarantee that your coal deal with Mr. S. Rosenfels will not result in a loss to your company.
>
> Respectfully, etc.,
>
> HANNAH NEWMAN."

No notice of the acceptance of this letter was given to the guarantors until after the subsequent dealings between the plaintiff and the writer of the instrument, at which time the plaintiff had sold a large quantity of coal to Rosenfels, and his indebtedness for coal sold him during the months of October, November and December, 1883, amounted to $1,383.50. BAILEY, P. J. (who was afterwards a member of the Supreme Court of Illinois), said:

> "The rule clearly deducible from this general current of authority is, that a guaranty of this character cannot be held to be binding on the

guarantor, unless he is notified within a reasonable time that the party guaranteed has accepted the guaranty and is acting under it."

The guaranty in this case was a purely commercial transaction guaranteeing the payment by Rosenfels of coal purchased and delivered from time to time without any contract.

In *Ruffner* v. *Love*, 33 Ill. App. 601, the action was brought to charge the defendant upon an alleged contract of guaranty embodied in *certain letters sent by mail*, certain of which are as follows:

"*John W. Love, Esq.:*

I shall leave my capital in Ruffner & Somes until further advised; in meantime will be responsible for $4,000 for them from this date.

Yours respectfully,

F. W. RUFFNER."

NEW YORK, June 12, 1882.

Messrs. Ruffner & Somes, Chicago.

GENTLEMEN: I have not as yet heard anything from Mr. F. W. Ruffner in regard to the guaranty which I desire him to give me, about which I wrote you fully on the 1st inst.

Very respectfully,

JNO. W. LOVE."

CHICAGO, June 20, 1882.

Jno. W. Love, Esq.

DEAR SIR: I have been in the country for some time and on my return find the above letter. I propose, as I said at first, to be responsible for Ruffner & Somes for four thousand dollars ($4,000) and no more.

Very resp'y,

F. W. RUFFNER."

Ruffner & Somes purchased upwards of $8,900 worth of goods and paid on account from time to time $7,300, leaving a balance due of $1,508, to recover which the action was brought.

The Appellate Court through MORAN, *J.*, held that the letters did not constitute a completed contract of guaranty in the absence of notice to Ruffner that the guaranty was accepted. He says:

> "That there must be notice to the guarantor of the acceeptance of such a guaranty is settled beyond dispute by the authorities. *Newman* v. *Streator Coal Co.*, 19 Ill. App. 594; *Wells* v. *Davis*, 104 U. S. 159; *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524; *Gardner* v. *Loyd*, 110 Pa. St. 278."

DECISIONS OF OTHER COURTS.

In *Steadman* v. *Guthrie, et al.*, 4 Metcalf (Ky.), 146, at page 157 the Supreme Court of Kentucky discussed this question in reference to the following instrument:

> "Louisville, October 1, 1857.
>
> "We, the undersigned, agree to guaranty the depositors of Wm. E. Culver in the payment in full of their demands against said Culver, on account of money deposited with him.
>
> "We have entire confidence in his ability to meet all demands.
>
> "James Thompson, Levi Tyler, Isaac Caldwell, F. S. J. Ronald, } James Guthrie, Wm. B. Caldwell, Joseph Swager, W. H. Stokes."

The instrument was one of guaranty and was so treated by the court. Discussing the rule as to notice of acceptance, the court said:

> "It remains to be considered whether or not notice to the appellees of an acceptance of the guaranty by the appellant was necessary; and, if it was, whether or not the petition avers such notice.

"It is a general rule that if a person offers to pay money upon the performance of an act by another, the performance of the act by the latter, without any notice of his acceptance of the offer, or of his intention to act upon it, gives him a right to demand the money. This rule applies to the offer of a reward for the return of lost property, and to many other cases. But it is settled in the tribunals of the United States, and of several states, as an exception to that rule, that where the offer is to guaranty a debt for which another is primarily liable, in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. This doctrine appears to have been rejected by the courts of New York and of several other states; but the authors of the American Leading Cases, while they apparently question its correctness, concede, and the cases cited by them prove that it is sustained by the decided weight of American authority. (2 Amer. Lead. Cases, 35-107.)

"The importance of establishing a general rule concerning contracts of this character, which frequently arise between citizens of different states, furnishes a reason for following the rule adopted by the Supreme Court of the United States: and though we are not aware that this court has heretofore expressly decided the question, it has repeatedly sanctioned the doctrine under consideration. (*Kincheloe* v. *Holmes*, 7 B. Mon., 5; *Bell & Terry* v. *Kellar*, 13 Ib., 381; *Low & Co.* v. *Beckwith*, 14 Ib., 184.) Finally, it seems to us to be a just and reasonable doctrine, though, like every other general rule, it may sometimes operate with hardship. We do not mean to intimate, however, that its application in this case would so operate on

the appellant, for, though his petition shows that he forbore to demand his deposits from Culver upon the faith of the guaranty, it does not certainly appear that he would have gotten his money if he had demanded it. This, however, does not affect the merits of the legal questions involved.

"The reason for this doctrine was thus stated in *Douglas* v. *Reynolds*, 7 Pet., 113: 'A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed intends to give credit on the faith of it or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate in a great measure his course of conduct and his exercise of vigilance in regard to the party in whose favor it is given. Especially it is important in the case of a continuing guaranty, since it may guide his judgment in recalling or suspending it.'

"These reasons apply to the case before us, and we perceive no ground upon which it can be excepted from the operation of the rule founded upon them."

In *Kincheloe* v. *Holmes, &c.*, 7 B. Monroe, 5, the instrument sued on was a letter of introduction introducing John O'Brian of the firm of Kincheloe & O'Brian as visiting Philadelphia for the purpose of purchasing goods, and proceeds as follows:

"They are entirely solvent and doing good business. I will guarantee any debts of theirs. Any friendship you may show Mr. O'Brian in selling him goods, or introducing him to merchants in your city, will be thankfully received by him, and *I will be responsible for any contracts growing out of such introduction.*"

Referring to this guaranty, the Supreme Court of Kentucky said:

"By the nature of this action, and the terms of the declaration, the guaranty of the defendant, though contained in a letter to Rockhill & Co., and not addressed particularly to the plaintiffs, is treated as a contract with them. When did the guaranty, which was originally a mere offer made to the merchants of Philadelphia generally, or at least to such as should be applied to for credit by O'Brian on the faith of its promise, become a contract between the plaintiffs and the defendant? Must not that mutual assent of the parties which is necessary to constitute an agreement or contract between them, be evidenced by some external act, or at least by some fact tending to show the assent? Must not this fact be of such a nature as to convey to each a knowledge of the assent of the other? *And is the mere fact of selling goods in a distant city to a person having a letter of guaranty, which may or may not have been shown or relied on, a fact of this nature? Or rather may it be asked, is the fact that the party has given to another a general letter of guaranty which may be acted on, sufficient evidence to him that it has been acted on by any particular person?* It is true, the assent of the guarantor is sufficiently evidenced by his letter offering to guaranty any debt which the bearer may contract, &c., and he cannot retract his offer after it has been properly acted on. If he says he will guaranty the payment of a particular subsisting debt, and his letter is addressed to the creditor, and retained by him, the bare omission to reject the offer might be sufficient evidence of its acceptance. But in the case of an offer to guaranty future transactions wholly undefined in extent, with persons not named and not known, and which may or may not take place, it seems to be required by the essential nature of a contract, that the guarantor should be informed of the fact that his guaranty has been accepted and acted on, and by whom, and that this in-

formation should be communicated to him at once, or at least that the party accepting the guaranty and intending to rely on it, should at once take the proper steps for communicating it. As it should not remain optional with him for any indefinite period whether or not there is a contract between him and the guarantor. So, not only should the question of his acceptance of the guaranty and assent to the contract, be at once decided in his own mind, but his decision should be at once unequivocally manifested to the party whom he intends to hold bound, and for whose benefit alone an instantaneous decision is required.

"But it is in a practical point of view, immaterial whether we say that no contract arises, unless the party intending to rely on the guaranty gives notice of that intention, or that the guarantor cannot be held responsible unless he has had due notice of the acceptance of his guaranty. It is immaterial whether the notice be essential as a prerequisite to the existence of the contract, or whether it is essential to its availability and enforcement. The object or end of the requisition in either case, is that the guarantor may know that he is bound, and to whom, in order that he may be enabled to take such measures for his own safety, as circumstances may require. It cannot be presumed that the maker of a general guaranty, referring to future and indefinite transactions, intends either to dispense with a timely knowledge of the existence and extent of such liabilities as he is willing to incur under guaranty, or to impose upon himself the burden of inquiry to ascertain what merchants in a large city may have acted upon it. From the nature of the thing to be notified, which is the act or intention of one of the parties, the duty of giving notice seems appropriately to devolve on him. As in other cases, the notice should be given at once; that is, in reasonable time, with a view to the accom-

plishment of the purpose for which it is required, and if given after the transaction based upon the guaranty has actually occurred, the notice should communicate the nature and extent of the transaction. All this seems to be required by that good faith and precision and promptness which characterize the principles and usages of the law merchant. And so far at least as regards the necessity of seasonable notice of the acceptance of the guaranty, the rule above stated is, as we think, fully sustained by authority.

"In the case of *Adams* v. *Jones* (12 Peters' S. C. Rep., 213), Judge STORY, after stating the question to be, 'whether upon a letter of guaranty, addressed to a particular person or persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor, that the person giving the credit has accepted or acted on the guaranty, and given the credit on the faith of it,' goes on to say, 'we are all of opinion that it is necessary, and that this is not now an open question in this court, after the decisions which have been made, in *Russell* v. *Clark*, (7 Cranch, 69;) *Edmondson* v. *Drake*, (5 Peters, 624;) *Douglas* v. *Reynolds*, (7 Peters, 113;) *Lee* v. *Dick*, (10 Peters, 482;) and again recognized at the present term, in the case of *Douglas* v. *Reynolds*.' And after demonstrating the entire reasonableness of the rule, he says, 'If therefore, the question were entirely new, we should not be disposed to hold a different doctrine, and we think the English decisions are in entire conformity with our own.'

"Upon referring to the cases above cited, it will be found that while the letter of guaranty is in none of them more indefinite or comprehensive than in this case, it is in several instances decidedly less so. And yet in each of them the same doctrine of the necessity of giving notice of the acceptance of the guaranty, &c., is in-

fallibly maintained. In *Douglas* v. *Reynolds*, (7 Peters, 125) it is decided that the notice must be given in a reasonable time after acceptance of the guaranty, and in other cases the expression is due notice. But without any such express qualification of the rule, the requisition of notice implies that it shall be given in a reasonable time after the fact, so as to make it available to the party for the purposes for which it is required to be given."

In *Oaks* v. *Weller*, 13 Vt., 106; 37 American Decisions, 583, the Supreme Court of Vermont said:

"COLLAMER, J. The courts in this state, following the American decisions on the subject, have holden that a guarantor shall have notice of the acceptance of his guaranty. But they have also holden that this notice need not be a direct, actual and personal notice, given only by the plaintiff or his agent. Whether notice was had, is a question of fact, to be found by the jury, from the testimony and circumstances in the case. This was so decided in the case of *Lorillard* v. *Williams*, in this county, and in *Train* v. *Jones*, 11 Vt., 444, in Windsor County. The reasonableness of this principle is quite obvious, and commends itself to the moral sense. *When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes his responsibility for a thing to be done for another, he may not know that it is done, or, even if he does, he will not know whether it was done on his proposition, or on the sole credit of the third person, or on some other security. The responsibilities and duties of a guarantor imply certain correlative rights and privileges, which, without notice of his condition, he can never exercise.*"

(B.) *The rule does not apply to instruments which*

are absolute guaranties. (*To this class belongs Davis* v. *Wells.*)

In *Wildes* v. *Savage*, 1 Story 22, Mr. Justice STORY sitting at *nisi prius* in the first circuit, said:

> "It was said at the argument, that in cases of guaranty of future advances, to be made to another person, notice must be given to the guarantor by the party making the advance, that he accepts the guaranty, and consents to make the advances; and also notice, that he has made the advances and acted upon the guaranty; and, lastly, notice, that he has made a due demand upon the debtor, and his refusal to pay the amount, when due. The two former, it is added, are conditions precedent to the legal operation of the guaranty; and if not duly given, the guarantor is not bound by his guaranty, whether he suffers any damage or not. The notice of the non-payment, it is admitted, is not a condition precedent; but it must be given in a reasonable time, and if the guarantor suffers any damage from the default of the creditor, he will, at least, to the extent of that damage, be exonerated.
>
> I admit that upon every guaranty for future advances, it is the duty of the party making the advances, to give notice to the guarantor of his acceptance thereof and of his consent to act under the guaranty, and to make the advances. This is conclusively established by the decisions of the Supreme Court in *Russell* v. *Clark*, 7 Cranch R. 69; *Edmondston* v. *Drake*, 5 Peters R. 624; *Douglas* v. *Reynolds*, 7 Peters R. 113; *Lee* v. *Dick*, 10 Peters R. 482; *Adams* v. *Jones*, 12 Peters R. 207; and *Reynolds* v. *Douglas*, 12 Peters R. 497. This doctrine, however, is inapplicable to the circumstances of the present case; for the agreement to accept was contemporaneous with the guaranty, and indeed constituted the consideration and basis thereof. And at all events, here there was due notice of

an agreement to give the credit, and to make the advances contemplated by the guaranty.

Upon the other point, I have more difficulty in yielding to the argument. Where a guaranty is accepted, and notice has been duly given to the guarantor, that the party will act upon it, and give credit and make advances accordingly, I am not aware, that it has ever been held, that it was indispensable in all cases to give another and a further distinct notice to the guarantor of the amount of the advances actually made, and the terms, upon which they have been made, when the transaction is completed. All that I have supposed to be generally required of the person making the advances or giving the credit, after having given due notice of his acceptance and intention to act upon the guaranty, is, to make a demand upon the debtor, when the credit has expired, or the amount has become due, and upon his default to give notice thereof within a reasonable time afterwards to the guarantor. There is no case to my knowledge, which goes the length, that there should be three substantive or distinct notices in all cases, as contended for at the argument; and, as an original question, I should not be disposed to entertain it; since it would throw such arduous duties on the guarantee (as I desire to call the party accepting the guaranty), as would materially tend to impair the utility and convenience of that instrument."

Davis v. *Wells*, 104 U. S. 159, is a case of an absolute guaranty as distinguished from an offer to guarantee, in which Mr. Justice MATTHEWS says (page 167):

"On the supposition that the terms of the instrument constitute a mere offer to guarantee the debt of Gordon & Company, we accept the conclusion as entirely just, but we are unable to agree to that supposition. We think that the

> instrument sued on is not a mere unaccepted proposition."

While the instrument in this case is under seal, it is strictly a commercial guaranty of "any indebtedness of Gordon & Company, a firm now doing business at Salt Lake City, Territory of Utah, to the extent of and not exceeding the sum of $10,000, for any overdrafts now made, or that may hereafter be made at the bank of said Wells, Fargo & Co."

The instrument was delivered to a bank for the purpose of obtaining credit for Gordon & Co., a purely commercial transaction, and one which would be governed by the law merchant as much in reference to this instrument as to the payment of the drafts referred to in the instrument of guaranty.

In *Kent* v. *Silver,* 47 C. C. A. 408, 108 Fed. 365 (C. C. A. 3d Circuit), the Columbia River Navigation Company gave its note for money borrowed and attached to it was a guaranty (not under seal) guaranteeing its payment. BUFFINGTON, district judge, speaking for the Circuit Court of Appeals, said of this instrument:

> "Being attached to, and delivered with the note, it was an absolute obligation and not a conditional one which required notice of acceptance."

Citing *Davis* v. *Wells,* 104 U. S. 164.

In *Dowd* v. *The National Park Bank,* 54 Fed. Rep. 846 (C. C. A. 5th Circuit, 1893), the instrument of guaranty recited that the First National Bank of Sheffield, Alabama, desired to establish a credit with the National Park Bank of New York to obtain

advances, loans or discounts, and the undersigned being stockholders and directors, jointly and severally guaranteed all advances which might be made to the First National Bank by the National Park Bank. McCormick, Circuit judge, speaking for the court, held that no notice of acceptance of the guaranty was necessary because "the guarantors had a direct personal interest in the credit to be extended to the principal debtor." The court also refers to both *Davis* v. *Wells* and *Davis Sewing Machine Co.* v. *Richards,* and holds there is nothing in the latter case to support the contention of the plaintiff in error that notice of acceptance was necessary.

In *Bond* v. *John V. Farwell Co.,* 172 Fed. Rep. 58 (Circuit Court of Appeals, 6th Circuit), the instrument before the court recited "for and in consideration of the sum of $1 to the subscriber in hand paid by John V. Farwell Co., the receipt whereof is hereby acknowledged * * * do hereby guarantee," etc. Proof was offered and it was contended that the dollar mentioned was never paid and that no notice of acceptance was given by the Farwell Company to Jobe & Bond, the makers of the guaranty. The court (Lurton, Severens and Warrington, Circuit Judges) held that the recital of a consideration in the guaranty, although nominal, dispensed with the necessity of notice of acceptance.

Warrington, Circuit Judge, speaking for the court, said:

> "The contention made that no notice of acceptance was given by the Farwell Company to Jobe & Bond, is quite as effectually disposed of by the decision just cited (*Davis* v.

Wells) as is the question of consideration. The claim made here like that urged in *Davis* v. *Wells* is that these guarantors made merely an offer which could not bind them until accepted by the guarantee. In *Davis* v. *Wells*, the guaranty was given by Davis and Patrick to Wells, Fargo & Co., and was not different in the respect now under discussion from the guaranty in question. Mr. Justice MATTHEWS said (page 167 of 104 U. S. 26 L. Ed. 686):

'We think that the instrument sued on is not a mere unaccepted proposal. It carries upon its face conclusive evidence that it had been accepted by Wells, Fargo & Co., and that it was understood and intended to be, on delivery to them, as it took place, a complete and perfect obligation of guaranty. That evidence we find in the words "for and in consideration of one dollar to us paid by Wells, Fargo & Co., the receipt of which is hereby acknowledged, we hereby guarantee," etc. How can that recital be true, unless the covenant of guaranty had been made with the assent of Wells, Fargo & Co., communicated to the guarantors? Wells, Fargo & Co. had not only assented to it, but had paid value for it, and that into the very hands of the guarantors, as they by the instrument itself acknowledged.'

It is true that in the present case neither instrument was delivered in person by either Jobe or Bond to the Farwell Company; but the instruments were signed by Jobe and Bond, and were each turned over by Jobe to the manager of the Bond-Penn Company for the purpose of delivery. Upon this question, then, the instruments must, we think, be treated the same as if they had been personally given by the guarantors to the guarantee, and the consideration had at that time been in fact paid and received."

ILLINOIS CASES.

In the early case of *Cook* v. *Orne*, 37 Ill. 186 (decided in 1865) the Supreme Court of Illinois first considered this question and discusses the distinction between a mere offer to guarantee which requires notice of acceptance to render the offer reliable, and a completed contract of guaranty which dose not require notice of acceptance, and the court says:

> "It is also urged by the plaintiff in error that Cooke was entitled to notice that his guaranty had been accepted and would be acted upon, and *Adams* v. *Jones*, 12 Pet. 213, and other cases, are cited in support of this position. These authorities, however, are not in point. *Undoubtedly it is the settled law, that where a letter of credit is addressed either to a particular person, or to the public generally, and credit is given in consequence thereof, the person giving the credit must notify the guarantor, within a reasonable time, that the guaranty has been accepted.* But here this notice is implied in the very nature of the transaction. Hulme did not go to Philadelphia with a letter from Cooke stating that if Orne would sell Hulme carpets, Cooke would guaranty the payment, and, on the strength of such letter procure the carpets. Cooke being ignorant whether his offer would be accepted or not. On the contrary, the proposition comes from Orne. He says, by the letter of Henkle, if Cooke will guaranty the payment, I will sell. Cooke writes, in the postscript of Hulme & White's letter, that he will guaranty. The moment he wrote that acceptance of Orne's offer, the bargain was complete. He then knew that the goods were to be furnished upon his credit. He knew his guaranty was already accepted and that he would be responsible for the goods, if furnished before the guaranty

was withdrawn, and within a reasonable time. Any further notice of the acceptance of the guaranty would have been superfluous."

It is significant that the court refers to such an instrument as a "letter of credit" *addressed to a particular person or to the public generally.*

In *Sears* v. *Swift & Co.*, 66 App. 496, the action was brought to charge the defendant upon an instrument purporting to guarantee the payment of all purchases made by the Cashin Packing Company from Swift & Company in the following form:

"CHICAGO, Ill., January 20, 1895.

In consideration of the sum of one dollar ($1) to us in hand paid and for other good and valuable considerations, we, John J. Cashin and W. H. H. Sears, do hereby guarantee the payment of all purchases made by the Cashin Packing Company, recently incorporated, or for its use, from Swift & Company at the Union Stock Yards, and all purchases made by the said Cashin Packing Company or for its use from any of said Swift & Company's branch markets located in the City of Chicago.

This guaranty to stand good for all and any unpaid balances due said Swift & Company or its branch markets by said Cashin Packing Company, which said balance we or either of us will pay upon demand.

This guaranty shall remain and be in force until revoked in writing by both guarantors, said revocation to be served personally on some officer of Swift & Company and to take effect ten days after date of said service.

JOHN J. CASHIN,
W. H. H. SEARS."

After the guaranty was signed, Swift & Company continued to sell goods to the Cashin Packing Company on credit. No notice to Sears of the acceptance

by Swift & Company of the guaranty or of its intention to sell goods in reliance upon the guaranty or of any such sale was shown. Nevertheless, the Appellate Court held (following *Davis* v. *Wells*) that in view of the consideration recited in the instrument, and "where the words of the guaranty are certain and clearly show an intention to be bound as soon as the promise is delivered, notice of acceptance is unnecessary."

The court held the defendant liable upon the instrument as a completed contract of guaranty, because of the certainty of terms and the recital of a consideration.

In *Neagle* v. *Sprague*, 63 Ill. App. 25, the plaintiff brought an action upon an instrument embodied in a letter as follows:

"September 2, 1893.

F. C. Neagle & Son.

GENTLEMEN: We received your telephone message to deliver a certain bill of glass to A. W. Hack & Co., and that you would be responsible for the same. If you desire us to deliver further goods to this firm, and desire to guarantee the payment, will you give us a letter to that effect, as telephone messages are not, as a rule, satisfactory?

Yours truly,

SPRAGUE, SMITH & Co."

"September 5, 1893.

Please let the above firm have what they want for the present month and we will guarantee the payment of the same.

F. C. NEAGLE & SON."

"N. B. I will send you a check for the balance we, F. C. Neagle & Son, owe you this week, $141."

In pursuance of such instrument, goods consisting

of glass to the amount of $211.70 were afterwards delivered by the appellees to A. W. Hack & Co. The point is made that no notice of acceptance was given, and the court said:

> "We do not think any other notice was necessary than that which is embodied in the proposition of appellees, which was in substance that they would sell if appellant would guarantee, and to which appellant replied he would guarantee."

In *American Exchange National Bank* v. *Seaverns*, 121 Ill. App. page 480, an action was brought to charge the defendants upon an instrument in the following form:

> "CHICAGO, Nov. 15, 1886.
>
> *Geo. A. Seaverns,*
> *153 Monroe St.*
>
> In order to help Mr. C. J. Kershaw and for his benefit, we agree to guarantee the firm of C. J. Kershaw & Co., a firm formed on November 1, 1886, and composed of Chas. J. Kershaw and Hamilton Dewar, as general partners, and Charles B. Eggleston as special, under the name and style of C. J. Kershaw & Co., as above stated, to the extent of $10,000 on any indebtedness the said firm may incur and owe to the American Exchange National Bank of Chicago, and that the said firm may be unable to pay.
>
> This guarantee to continue in force from date hereof until canceled by either of the guarantors by written notice and is to cover indebtedness that may arise during its continuance.
>
> GEO. A. SEAVERNS,
> JOHN CUDAHY.
>
> To the American Exchange Nat'l Bank of Chicago."

The court said:

> "If that instrument is a mere offer or pro-

posal to guaranty, then notice of its acceptance was necessary. If it was an absolute guaranty, it became binding upon delivery to the plaintiff and no notice of its acceptance was necessary.

"We hold that the instrument set out in the second additional count is an absolute guaranty and not a proposal to guaranty, *that it became effective when delivered to and acted upon by the appellant bank and that no notice to the guarantor of the acceptance of the guaranty or of advances by the bank* to Kirshaw & Co. on the faith of it *was required* to make the guarantor liable thereon for such advances.

In *Acorn Brass Mfg. Co.* v. *Gillmore*, 142 Ill. App. 567, the court held that the letter containing the words, "I will be responsible for the amount of $500 for Dr. Stevens," was an absolute guaranty and not a mere proposal or offer. In this case the court cites *Davis* v. *Wells*, 104 U. S. 159.

In *Frost* v. *Standard Metal Co.*, 215 Ill. 240, affirming 116 Ill. App. 642.

The instrument upon which the suit was brought was in the following form:

"CHICAGO, July 10, 1901.

Standard Metal Co.

GENTLEMEN: I hereby guaranty the purchase account of George K. Harrington & Co. to the amount of one thousand five hundred dollars ($1,500).

R. CHESTER FROST."

The Supreme Court of Illinois held that the guaranty in question was absolute and said:

"Moreover, the guaranty is absolute and unqualified and such guaranties become effective as soon as acted upon. *An acceptance is necessary to create a liability if there is only a pro-*

posal to guarantee, but that rule has no application when the undertaking is primary and absolute."

In this case the Supreme Court of Illinois refers to the early case of *Cook* v. *Orne*, 37 Ill. 186, and also cites *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524.

In *Pressed Radiator Co.* v. *Hughes*, 155 Ill. App. 80, the suit was brought to charge Hughes upon an instrument in the following form:

"SPRINGFIELD, Ill., May 14, 1907.
Pressed Radiator Co., Pittsburg, Pa.
GENTLEMEN: I hereby guarantee payment of invoice covering the forty (40) radiators purchased of you by Mr. F. P. Sexton, the heating contractor of this city, for my new flat building now in course of construction. I understand that you are not acquainted with Mr. Sexton, and guarantee the payment so as to avoid delay of shipment.

A. F. HUGHES.

It was held that the guaranty embodied in the letter set out in the opinion was an absolute guaranty and not a mere offer or proposal. The court said:

"Neither has the principal that an offer to guarantee the debt of another about to be created must be accepted within a certain time, and notice given to the guarantor of such acceptance, any application to the case at bar. *The guaranty here involved being absolute and unqualified, became effective as soon as acted upon and no notice of its acceptance was essential in order to bind the guarantor.*"

The court cites in support of this doctrine, Brandt on Suretyship and Guaranty, Section 193, and *Davis Sewing Machine Co.* v. *Richards*, 115 U. S. 524.

In all of these cases, and in every other case that we have been able to find upon this question of notice of acceptance, the transactions involved are commercial transactions relating to the sale of goods or the advancement of moneys or credits.

The other cases cited in our brief announce substantially the same doctrine.

Newcomb Bros. v. *Emerson*, 46 N. E. 1018; 17 Ind. App. 482.

Bryant v. *Stout*, 44 N. E. 68.

Deering & Co. v. *Mortell*, 16 L. R. A. (N. S.) 353, 110 N. W. 886.

Lane v. *Mayer*, 44 N. E. 73.

Shows v. *Steiner, Lobman & Frank*, 57 So. 700.

J. R. Watkins Medical Co. v. *Brand*, 136 S. W. 867; 143 Ky. 468.

People's Bank v. *Stewart*, 133 S. W. 70; 152 Mo. App. 314.

J. L. Mott Iron Works v. *Clark*, 69 S. E. 227 (S. C. 1910).

Bank of California v. *Union Packing Co.*, 111 Pac. 573 (Wash. 1910).

Emerson Mfg. Co. v. *Rustad*, 120 N. W. 1094.

Sheppard v. *Daniel Miller Co.*, 68 S. E. 451.

Sheffield v. *Whitfield*, 65 S. E. 807.

Booth v. *Irving Exchange Natl. Bank*, 82 Atl. 652.

McConnon & Co. v. *Laursen*, 135 N. W. 213.

Furst Mfg. Co. v. *Black*, 111 Ind. 302; 12 N. E. 504.

We have not briefed these cases in this argument because we fear that to do so would extend it unduly. Undoubtedly some of the cases involving this

question depart more or less from the doctrine recognized by this court in *Davis* v. *Wells* and the earlier cases, and apply the rule of notice to cases in which strictly it ought not to be applied.

This is always true of any question of law, however, and it is not always safe to accept dogmatically any single decision of a court without a broad view of the cases. We think, however, that if the distinction between contracts of guaranty on the one hand and contracts of indemnity and suretyship on the other is borne in mind, the adjudicated cases will be found upon investigation to be substantially in accord with the general doctrine.

III.

THE DOCTRINE OF NOTICE OF ACCEPTANCE IS NOT APPLICABLE TO BONDS OF INDEMNITY OR TO ANY FORM OF INSTRUMENT WHICH IS AN ORIGINAL UNDERTAKING. A BOND OF INDEMNITY OR OTHER ORIGINAL UNDERTAKING WHEN EXECUTED, DELIVERED AND ACTED UPON, BECOMES EFFECTIVE AT ONCE.

A careful examination of the authorities has satisfied us that the doctrine of notice of acceptance is one which has been created and applied only to commercial contracts of guaranty. The doctrine had its origin in the peculiar way in which such contracts are created, and because they create obligations to pay sums of money, the particulars of which are in many cases unknown to the proposing guarantor. As stated by this court in the earlier cases above cited, he is entitled to know the parties are looking

to him to pay, and when the indebtedness is liable to mature and the amount thereof. Frequently the letters addressed by a guarantor are letters of credit addressed to the world at large, and if they are to be acted upon by any one, the writer of the letter is entitled to be informed of that fact.

Obviously this doctrine has no application to bonds of indemnity or bonds of suretyship in the form of writings obligatory or specialties under seal, which are executed and delivered like any other instrument of that character and take effect upon delivery. In another part of this brief we have already called attention to the fact that while the doctrine of notice of acceptance is discussed at length in the encyclopaedias and text books on the subject of guaranties, there is no mention of the doctrine when the subject of indemnity or bonds of suretyship is treated.

While it is undoubtedly true that the doctrine of notice of acceptance as applied to offers to guarantee has no application to bonds of indemnity or suretyship, necessarily, the number of cases in which that question is directly involved and adjudicated is more or less limited; we have, however, found a number of cases in which the court has plainly held that the doctrine has no application to instruments of the kind here involved.

In *McIntosh, Huntington Co.* v. *Reed*, 89 Fed. Rep. 464, BUFFINGTON, Circuit Judge, considers this question. The undertaking of the defendant was held by the court to be that of a *surety* rather than that of a *guarantor* for the reason that the obligation was a direct and original one and not dependent upon the

inability to collect from some one else; and the court holds that the doctrine of notice of acceptance has no application to the contract of a surety.

This is a much stronger case than the one at bar, because the undertaking was not a common law bond or writing obligatory, but was a contract to secure the payment of a debt. In other words, the word "surety" in this case is used in its commercial sense rather than in the sense of a common law surety who executes a writing obligatory under seal with another as principal.

It will at once occur to any one reading this decision that if the doctrine of notice of acceptance is not applicable to a contract of suretyship not under seal, which insures the payment of a sum of money, then *a fortiori* the contract of a common law surety, in a writing obligatory under seal is certainly not subject to the rule.

As we have already pointed out, Judge BUFFINGTON is thoroughly familiar with the rule of notice of acceptance, as he decided *Barnes Cycle Co.* v. *Reed*, 84 App. 601, and *Kent* v. *Silver*, 108 Fed. 365, which apply the doctrine of notice respectively to an offer to guarantee and to an absolute guaranty; and is thoroughly familiar with the doctrine as applicable to the three kinds of instruments.

Another case in which it was directly adjudicated that the doctrine of notice of acceptance is not applicable to bonds of suretyship is *Hall* v. *Weaver*, 34 Fed. 104, decided by DEADY, District Judge, in 1888, in which the distinction between contracts of guaranty and contracts of suretyship is well stated, and

in which *Davis* v. *Wells* and *Davis Sewing Machine Co.* v. *Richards* are expressly distinguished by the court. In that case as in the case at bar, the instrument was in the form of a bond conditioned that the principal would well and truly paying the obligee certain moneys, in which event the bond should become null and void; otherwise to be and remain in full force and effect. It was contended, as in the case at bar, that there could be no liability under this undertaking, unless notice of the acceptance thereof was given by the plaintiffs to the obligors.

The court after distinguishing guaranty and suretyship contracts, and holding that the case of *Davis* v. *Wells* and the case of *Davis Sewing Machine Co.* v. *Richards* were inapplicable, because the rule with reference to notice was intended to be confined to guaranty contracts solely and not to be applied to suretyship contracts, held that the contract or bond under consideration, being one of suretyship as distinguished from a guaranty, no notice of acceptance was required.

The instrument before the court in that case was a writing obligatory in the penal sum of $20,000, conditioned that "if the above bounden W. F. Owens shall well and truly pay unto the said Hall & Co. upon usual and proper demand the sum or sums of money paid by said Hall & Co. or honored so as to be paid on orders, checks, or drafts, etc., then and in that event this bond shall become null and void and of no effect; otherwise in full force and virtue." Judgment was entered on the instrument and on motion for a new trial the point was made that the bond or instrument sued on *was a guaranty* and that

there could be no liability on it unless notice of the acceptance thereof by the plaintiffs was given to the obligors. The court said:

> "It is apparent from this summary (made in the quotation from *Davis Machine Company* v. *Richards*) of the rules governing the contract of guaranty, that the contract sued on in this case, by which Weaver undertook directly, with and as surety for Owens, for the payment of advances made by plaintiffs to the latter, is not such a contract.
>
> In deference to the strenuous contention of counsel for the motion for a new trial I have re-examined the question whether the writing signed by Owens and Weaver on January 7, 1886, made the latter a surety for or only a guarantor of the former, and I find neither reason nor authority for holding Weaver's undertaking to be anything different from or less than that of a surety. The terms 'surety' and 'guarantor' are often used in the books loosely and indiscriminately. They occupy a certain ground in common, but there is a marked distinction both in the form and effect of the undertakings."

After quoting from *Kearnes* v. *Montgomery*, 4 W. Va. 29, that

> "the contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety which is direct, etc.,"

and from *Courtis* v. *Dennis*, 7 Metc. 518, to the effect that the rules of common law govern sureties, but guarantors are governed rather by the rules of the law merchant, the court said:

> "Now, the undertaking of Weaver, within all these definitions and distinctions, is that of a surety,"

and held that no notice of acceptance was necessary.

Another case which directly adjudicates this question and is interesting because the instrument involved was a bond of indemnity given to a surety as obligee and, therefore, analogous to the instrument in the case at bar, is the case of

Byrd v. *Washburn,* 10 Pick. 223.

In that case the action was brought upon a bond of indemnity given to indemnify the plaintiffs against loss in consequence of becoming bail to liberate a prisoner under charge of larceny. The defense was that there was not sufficient delivery and acceptance of the bond by the plaintiffs. Upon this question the Supreme Court of Massachusetts said:

> "The statement of facts shows that the bond was executed by the defendants in the State of New York and sent to the defendants by mail. This shows a manifest intention on the part of both defendants to deliver, and such intention, coupled with an act which puts it in the power of the obligees, is a good delivery. So an unconditional delivery to a third person for the use of the obligees, is a good delivery to them, and gives efficacy to the instrument as the deed of the obligors. *If it was intended to rely on the point, that the deed was not accepted by both of the plaintiffs, we think the objection is also answered by the facts. In general, the bringing of an action by an obligee, as it affirms the instrument, and treats it as a valid and subsisting deed, is sufficient evidence of an acceptance.*"

Yet the Supreme Court of Massachusetts, which rendered this decision, held at the same time in *Allen* v. *Pike,* 3 Cushing 238; *Babcock* v. *Bruant,* 12 Pickering 135; and *Mussey* v. *Rayner,* 22 Pickering 223, that notice of acceptance was necessary in the case of a contract which was a *mere offer to guarantee.*

In *Haywood* v. *Townsend,* 38 N. Y. Supp. 517, one Robert M. Townsend was designated in the last will and testament of Cynthia Lane, and letters testamentary were issued to him. The further facts we quote from the report of the case:

> "On the 15th day of March, 1865, Robert M. Townsend, principal, and the defendants, John J. Townsend and Enoch L. Townsend, as sureties, executed a bond, under their hands and seals, conditioned that the said Robert M. Townsend should well and truly discharge the duties of his trust, and keep the said legacies invested for, and pay the same to Cynthia J. and Alice Haywood, their attorneys, administrators, executors, or assigns, with interest, on their becoming of age, according to the requirements of the said last will and testament. This bond appears to have remained with Robert M. Townsend, or, if it was ever filed in the surrogate's office, was subsequently taken therefrom; for some two or three years afterwards it was in the possession of Robert M. Townsend, and was taken from him by the defendant John J. Townsend, and burned.
>
> The most serious objection made is that the bond was never delivered. We are not cited to any authority as to what is necessary to a delivery, in a case such as this. Delivery is always a question of intention, which must be that the instrument shall be operative. Am. & Eng. Enc. Law, 458. The same strict rules do not apply to bonds and undertakings as to deeds. The defendants, it appears from the testimony, knew what the bond was for; that, without it, the trustee, Robert M. Townsend, could not acquire possession of the money that was left by the testatrix for the benefit of the legatees. They signed and executed the bond for the purpose of enabling him to get that money. When they delivered it to him, and left it with him, after having executed it, it was, so far as any

act of theirs necessary, to be done to fix their liability upon the bond, complete. Their obligation was something more than that of an indorser upon a note, or a guarantor of the payment of money. They became responsible for the fidelity of the trustee,—his integrity. *Douglass* v. *Ferris*, 63 Hun 413; 18 N. Y. Supp. 685. Before he could commence the duties of his trust, his faithfulness must be guaranteed. When they placed in his hands the bond signed by them, their act was finished. They had guaranteed his fidelity, and become responsible for any breach. So far as they were concerned, the delivery was complete. They had delivered the instrument to him with the intention that their guaranty should be operative; that it should enable him to enter upon the duties of his trust. * * * The requirement that it should be filed with the surrogate was for the benefit of the legatees, not for the benefit of the principal upon the bond, or his sureties; and the fact that it was not filed—that their principal did not do his duty in that respect—cannot be asserted by them as a defense to the bond. Their signing the bond was not conditioned upon its being filed. As above stated, the requirements that it should be filed was not for their benefit. It has been held that the requirements that a bond should be approved by the surrogate is not one for the benefit of the sureties, but of the creditors and legatees, and that the sureties cannot raise the objection that it has not been so approved; that such an objection is in the nature of an objection to their own act, or, rather, omission to act. *Mundorff* v. *Wangler*, 44 N. Y. Super. Ct. 495-505. *Having, by signing the bond and giving it to the principal, placed it in the power of the principal to secure the money, and he having done so, it has, so far as the principal and sureties are concerned, served its purpose; and the defendants should not be permitted to repudiate the bond, to the detriment of the parties it was apparently given to secure.*"

In *Singer Mfg. Co.* v. *Freerks*, 98 N. W. 705 (Supreme Court of N. D. 1904), the action is founded upon *a bond which was duly signed and executed by the defendants at the request of S. S. Clement, the principal therein, and was left with said Clement to be, and was by him, delivered to the plaintiff.* (A situation which is analagous to that in the case at bar.)

> "Clement was employed as agent, salesman, and collector for the plaintiff corporation on January 10, 1900. His duties were as enumerated in the bond. In consideration of said employment, Clement agreed that he would give to the plaintiff a guaranty or bond for the due and faithful performance of said agreement on his part, and the defendants signed the foregoing instrument as the guaranty or bond agreed to be furnished by said Clement. The only person who requested defendants to sign the bond was Clement, and the plaintiff did not, after the receipt of the instrument, or at any time, communicate to defendants, or either of them, notice of its acceptance of the same. The bond was delivered to plaintiff on January 15, 1900, and the employment of Clement terminated on the 15th day of November, 1901. Between these dates Clement defaulted in the sum of $626.02. Demand of payment was made upon Clement before suit, and demand for damages to the amount of the penalty of the bond including $50 attorney's fees, was also made upon the respondents. Neither demand was complied with.
>
> Respondents' position is, and the trial court found, that the bond above set forth was a mere offer of guaranty by the defendants, and did not become binding, because no notice of acceptance of the instrument as a guaranty was ever communicated to the defendants, or either of them, by the plaintiff. The case was considered as within the rule declared in *Standard Sewing*

Machine Company v. *Church*, 11 N. D. 420, 92 N. W. 805. In this the trial court erred. The mutual assent necessary to constitute this a binding contract, and which distinguished it from a mere unaccepted offer, is found in the facts stipulated. 'That in consideration of his employment Clement agreed that he would give to the plaintiff a guaranty or bond for the due and faithful performance of his agreement, and that the defendants signed the instrument as the guaranty or bond agreed to be furnished by Clement.' When respondents signed this bond, and left it with Clement to deliver to the machine company as the bond Clement had agreed to furnish, the mutual assent was given and sufficiently evidenced, and no further act or notice of acceptance was required to make it a binding obligation. The machine company had agreed in advance to accept this bond, and could not refuse to do so. The respondents by intrusting the bond to Clement for delivery to the machine company as the bond he had agreed to give in part consideration of his employment, constituted Clement their agent for the purpose of making such delivery. By such act, they enabled Clement to enter upon the discharge of the duty of his employment, and to get the money and property of plaintiff which he misappropriated; and they cannot now be heard to repudiate this obligation, to the detriment of the party it was given to secure."

In *Boyd* v. *Agricultural Ins. Co.*, 76 Pac. 986 (Colo., 1904), the action was brought upon a bond or writing obligatory, given by an agent of an insurance company conditioned that he should at all times upon the request of the company pay and deliver to said company all moneys, etc., belonging to said company, and the question was raised that the bond was never accepted by the obligee. The evidence

showed that the obligee was not satisfied with the bond and at different times complained that the sureties were not satisfactory.

As was said by the court:

> "However, the bond was retained by the obligee, and, while it may not have been satisfactory, it is evident that it was accepted for the purpose for which it was given, as shown by the fact that Boyd was permitted to act as agent of the obligee during the period of more than a year, and that this action was instituted thereon for the purpose of recovering, if possible, the amount of Boyd's indebtedness to the company. The acceptance of the bond must be presumed from the fact that it was retained by the obligee and the agent continued in the discharge of his duties."

In *Haupt* v. *James Cravens & Co.*, 120 S. W. 541, the instrument sued on was a bond given to the plaintiffs as general agents and managers of a certain fire insurance company to secure the faithful performance of his duties by one Finley, as its local agent at Dallas, Texas. It appears that Finley, when appointed, entered upon the discharge of his duties, but did not furnish the bond required of him, and he was notified by telegraph that his agency was suspended. He, therefore, communicated with the obligors in the bond and they executed the bond, and it was sent forward when it was received by the obligees. They wrote the agent acknowledging the receipt of the bond and further advising him that they would have their agent make inquiry into the financial standing of the parties, and if that inquiry proved satisfactory, the paper would be finally accepted. The obligors then filed the paper away. It

does not appear that any further inquiry was made as to the financial standing of the parties, and no further notice of acceptance was given to Finley or the sureties. Finley continued to do business under his agency until the spring of 1906.

The court said:

"By their first assignment of error appellants present the contention that the contract of suretyship, as evidenced by the bond, was not shown to have been accepted by Cravens, nor that appellants or Finley had been notified of such acceptance, and, therefore, the sureties are not bound. Appellants' contention is that the letter of Cravens acknowledging receipt of the bond was tantamount to a refusal to accept the same until and unless inquiry as to the financial standing of the sureties proved satisfactory, and that in these circumstances some further act of acceptance of the bond and notice thereof, to the sureties, was necessary before they became bound. The exact language of the letter of Cravens to Finley is after acknowledging receipt of the bond as follows: 'We will ask Special Agent Zintgraff to make inquiry into the financial standing of these parties, and, if that inquiry proves satisfactory, the paper will be finally accepted.' Finley was allowed to continue his agency. Cravens kept the bond, and nothing further was said about it. In the circumstances we think this was intended by Cravens, and was understood by Finley (it was not shown that the sureties knew anything of this letter), as an acceptance of the bond with the condition or proviso that, if Cravens was not satisfied as to financial standing of the parties, he should be at liberty to require another bond. It was treated by Cravens as a satisfactory bond, and Finley continued in the business, which he was only authorized to do upon giving a satisfactory bond. It is not alleged or shown by the sureties

that they had any impression that the bond had not been duly delivered and accepted. They were not entitled to notice that the bond had been accepted by Cravens. (*Johnson* v. *Bailey*, 79 Tex. 518, 15 S. W. 499.) *It was not an offer or proposal to guarantee or to become responsible for the acts of Finley, but an absolute obligation, intended to take effect at once upon delivery.*"

In *Newcomb Bros. Wall-Paper Co.* v. *Emerson*, 46 N. E. 1018, 17 Ind. App. 482, the instrument under consideration in this case was a letter written by the defendant to the plaintiff stating that "L. desires to make purchases from your firm. I will engage to secure sales to him in the sum of $300."

The court said:

"The only errors assigned relate to the ruling of the lower court in sustaining the demurrer to the various paragraphs of the complaint. The first paragraph of the complaint proceeds upon the theory that appellee is the surety of R. E. Emerson for $300. The second paragraph proceeds upon the theory that, by the written instrument therein set out, appellee became the guarantor for R. E. Emerson for the amount of $300. The third paragraph sets out the written instrument by which the appellant seeks to make appellee liable, and further alleges a written ratification by the appellee of the sales made thereunder, and an additional promise to pay. The question now arises as to what effect shall be given to the instrument of writing upon which each paragraph of the complaint is based. We shall not go extensively into a discussion of the different relations assumed by guarantors and sureties, or digest the cases which attempt to draw a line of distinction between contracts of suretyship and guaranty, and of the different classes of each. This court

has defined 'guaranty' to be an undertaking that the debtor shall pay; 'suretyship,' an undertaking that the debt shall be paid."

"The question then arises: *Is the instrument upon which this action is founded a strict guaranty, or is it an original undertaking to become binding upon delivery? If it belongs to the former class, notice of its acceptance was necessary to hold the appellee; if of the latter class, no notice was necessary. Shearer* v. *R. S. Peals & Co., supra; Bryant* v. *Stout* (Ind. App.) 44 N. E. 68; *Conduitt* v. *Ryan, supra.*"

The court then quotes from *Lane* v. *Mayer,* 44 N. E. 73, as follows:

"The appellees sued the appellant on the following agreement: 'Lebanon, Ind., 11-21, 1892. Messrs. Charles Mayer & Co., Indianapolis, Ind. —Gents: I hereby agree to hold myself responsible for, and agree to pay for, any goods and merchandise which may be purchased of you by A. L. Lane, Lebanon, Indiana, to the amount of five hundred dollars ($500). Wes. Lane, Cashier, 1st Nat. Bank.' It was averred that this instrument was delivered to the appellees, and that, in reliance thereon, they sold to A. L. Lane goods and merchandise of the value of $180.52. There was no averment that the appellees gave the appellant notice that they had accepted the obligation, and would act upon it, nor does the evidence show that the appellees gave the appellant notice of their acceptance. It is insisted that the appellant cannot be held liable in the absence of an averment and proof of such notice. If the instrument sued on is a strict guaranty, then notice of acceptance was essential before the appellant could be held liable. Without acceptance, the minds of the contracting parties could not agree upon the same terms, and no contract could be completed. Until accepted, and notice of such acceptance given, it would only be a naked proposition. *But if the*

instrument is an original undertaking, it became binding upon delivery, and no notice of acceptance was necessary. * * * A contract, although purporting to be a guaranty, may be so worded as to make it an original undertaking. In such cases the liability of the person executing it is analogous to that of a surety on a bond. It is often difficult to determine whether or not a given instrument is an original or a collateral undertaking, and there is some conflict of authority bearing upon this subject. Each case must in a large measure depend upon its own peculiar circumstances, and words used in the contract or written instrument. * * * Following these recent cases, we are of the opinion that the contract declared on in this case is an original undertaking, and that it was not necessary to aver or prove notice of acceptance."

The court then continued:

"The instrument upon which this action is founded is so worded that, under the decisions of this state, especially the later ones, it is a direct and absolute engagement to pay. Consequently, under these decisions, no notice was necessary to appellee of its acceptance."

In *Wise* v. *Miller*, 45 Ohio State Reports, 388, 14 N. E. 218, certain stockholders of a company entered into an agreement, providing that we "do hereby jointly and severally bind and pledge ourselves to each and all of said indorsers and sureties * * * that we will protect them and each of them, in proportion to the amount of stock held by us in said Company, against any and all losses and damages sustained by them or any of them, or which they may at any time be subjected to by virtue of any indorsement of said company's paper heretofore made by them, or that may hereafter be made by them."

The Supreme Court of Ohio said:

"The two propositions upon which the plaintiff in error asks the reversal of the judgments below are embraced in his exceptions to the report of the referee, and briefly stated are: (1) That Wise, having received no notice of the acceptance of the contract of guaranty, never became liable to the plaintiff; and (2) that some of the notes indorsed by Miller were renewed after the defendant notified him, on the twenty-sixth of October, 1875, that he would stand responsible for no liabilities thereafter created, and as to such he was discharged from his obligation. *Both of these propositions are based upon the hypothesis that the contract is purely one of guaranty, and that the defendant sustains no relation to the plaintiff but that of a guarantor.* Whether this be the true conception of the agreement, will be considered hereafter."

(2) "But is the undertaking of the defendant simply that of a guarantor? He and his coobligors were the stockholders of the corporation, and indirectly, at least, liable on its indebtedness to an amount equal to their stock; they were beneficially interested in its credit, and the property thereby obtained, and it was to their mututal advantage to advance its prosperity and develop its purposes. Recognizing this, in consideration of the mutual benefit derived by the stockholders of the company by reason of the indorsement of its paper,' they bound themselves to Miller that they would protect him against loss and damage sustained by such indorsements. By their covenant of indemnity to Miller, who on the faith of it indorsed the paper of the company for their mutual benefit, they expressly created an obligation like that which the law implies on the part of every principle, and his relation to them, if not strictly that of a surety, is analogous to it, giving rise to corresponding rights and remedies. The engagement of every principal is to idemnify

and protect his surety. This is implied from the relation of principal and surety, which generally arises when one becomes bound at the request and for the benefit of another. A surety, it is said, 'is a person, who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor or wholly unknown.' *Smith* v. *Sheldon,* 35 Mich. 42. The chief difference between the ordinary case of principal and surety, and the one we are now considering consists in the mode in which the relation is established. *Here the stockholders who signed the agreement expressly assume the position of principals, stipulate in terms to protect and indemnify their surety,* and agree among themselves upon the proportion of the liability each shall discharge."

In *Clark* v. *Howard,* 150 N. Y. 232, 44 N. E. 695, an instrument was executed by a party who had sold and transferred his entire stock of goods, reciting that he was indebted to the plaintiff in a certain sum and that in consideration of the premises the defendants "agreed to guarantee" payment of plaintiff's claim. The Court of Appeals of New York held that the undertaking was an *original promise and not a guaranty.* The court said:

"It is true that the meaning of such words, whether imputing an original or collateral promise, has been discussed mostly in cases where the statute of frauds has been relied upon

> as a defense. Still, the same principle will apply in any case where it is material to determine whether a promise is original or not."

And again the court said:

> "It appears that the plaintiff some time before the commencement of the action, demanded payment of the debt from the defendant, so that there can be no question as to the acceptance or adoption of the promise."

In this case it was held that the defendant's promise was an original undertaking creating an absolute liability on their part, to the plaintiff *on his acceptance of the promise,* irrespective of the liability of the original debtor.

In *Bruce* v. *Lambour,* 49 So. Rep. 659 (123 La. 969), one Lambour was employed by the plaintiff as its selling agent to sell its brands of liquors in the State of Louisiana, and in consideration agreed to pay him in lieu of salary fifty per cent. of the net profits on the sales; that he agreed to maintain an office in New Orleans, to devote his time and attention to the sale of the petitioner's goods and the collecting of the proceeds of the sales; that he agreed to furnish a surety bond for the faithful performance of his obligation and for the prompt and full remittance of all funds collected on account of sales; that Albert Godchaux signed jointly with Lambour a bond in favor of the petitioner in the penal sum of $5,000, conditioned to hold and keep petitioner harmless from any and all loss and damage which might accrue by reason of the failure of the said Michael Lambour to perform the duties imposed on him under said contract; to promptly remit all funds col-

lected on account of sales, etc. That Lambour had failed to live up to his obligations under said contract, and had collected moneys from parties and failed to make prompt remittance.

Proposition presented by defendant's counsel for the consideration of the Supreme Court, which was considered in the order in which they are found in their brief:

> "4. It is said that a more serious defect in the pleadings than any heretofore noted is to be found in the failure of the petition to allege an acceptance, on the part of the plaintiff, of the guaranty alleged to have been executed by the defendant, and to allege that notice of such acceptance was communicated to the guarantor.
>
> The petition, as we have seen, alleges:
>
> That said Lambour agreed, in said contract, to furnish a surety bond, conditioned for the faithful performance of his obligations and for the 'prompt and full remittance of all funds collected on acount of sales made hereunder,' and the payment of any balance, however accruing, existing in favor of 'petitioner.'
>
> Petitioner avers that, on the same day, to-wit, the 4th day of June, 1906, Albert Godchaux signed jointly and severally with said Lambour, a bond in favor of petitioner, in the penal sum of $5,000, conditioned, etc.
>
> According to the allegations of the petition, therefore, the furnishing of the bond was merely an act participated in by Lambour, Godchaux, and Alltmeyer, whereby the contract, under which Lambour was employed by plaintiff, was perfected, and that interpretation of the petition is sustained by the fact that the bond, in terms, makes the contract part of itself, and the signers of the bond 'agree to become the sureties of said Michael Lambour in accordance with the terms and provisions of said contract.' They,

therefore, bound themselves, not only for Lambour, but with him, and, as the two instruments are dated upon the same day, and are, by their terms, interdependent upon each other, the fact that the one became executory justifies the conclusion that the other did also. If, upon the other hand, the contract witnessed by the bond could be disassociated from that witnessed by the main contract and could be regarded as merely an offer, on the part of Godchaux and Alltmeyer, to hold plaintiff harmless, if plaintiff would employ Lambour as its selling agent, it was, nevertheless, an offer which was open to acceptance, by words, written or spoken, by action, or by silence or inaction. Rev. Civ. Code, Art. 1811.

'Where the law does not create a legal presumption of consent from certain facts, then, as in the case of other simple presumptions, it must be left to the discretion of the judge whether the assent is to be implied from them or not.' Rev. Civ. Code, Art. 1818.

The sureties knew that Lambour's contract with plaintiff, in order to become effective, required that he should furnish a 'surety bond,' and they, with Lambour, executed and furnished that instrument, and thereupon Lambour entered into plaintiff's employment.

It seems to us that the action thus taken was that which was contemplated by the parties, and to have been all that was necessary to the completion of the contract represented by the bond."

In *Lachman* v. *Block*, 15 Southern Reporter, 649 (46 La.), the instrument sued on was in the following form:

"New Orleans, June 4th, 1891. Messrs. Lachman & Jacobi, San Francisco, Cal.—Gentlemen: I hereby agree to become surety for the sum of $10,000, jointly and severally with Henry

Block & Bro. This agreement to bind me in the sum of $10,000 until the 15th day of October, 1891. Very respectfully (signed) C. Lazard."

"The matter of controversy between counsel, and that for the court to decide, is whether it was obligatory upon the plaintiffs to give the guarantor or surety notice of their acceptance of the guaranty or suretyship as a condition precedent to its validity. *The law of guaranty is not treated of, eo nomine, in the Civil Code, but it furnishes and formulates rules for the interpretation of the contract of suretyship in its stead, THE CONTRACT OF GUARANTY BEING GOVERNED AND CONTROLLED BY THE PRECEPTS OF THE LAW MERCHANT.* In order to arrive at an accurate conclusion with regard to the question of notice, it will be necessary to summarize and compare the essential ingredients of the contracts of suretyship and guaranty. The Code defines suretyship to be an accessory promise, by which a person binds himself, for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not. Rev. Civ. Code, Art. 3035. It must be restrained within the limits intended by the contract. *Id.* art. 3039. The surety is entitled to have the creditor discuss the property of the principal debtor, except he has become 'bound *in solido*, jointly with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors *in solido.*' *Id.* art. 3045, 3059. A guaranty is a collateral engagement to answer for the debt, default, or miscarriage of another person. De Coly. Guar. p. 1. That author states the essential requisites of the contract to be (1) the mutual assent of the parties; (2) that the parties be capable of contracting; (3) that it be supported by a valuable consideration. With regard to the mutual assent of the parties, he says: 'Every contract includes a concurrence

of intention in two parties, one of whom promises something to the other, who, on his part, accepts such promise. Until, therefore, an acceptance be given (which must be an absolute and unconditional acceptance of the previous offer), the promisor is not liable. In accordance with this doctrine, it has been decided that a mere offer to guaranty is not binding until acceptance by the person to whom the offer is made. Till then it is revocable by the party making it.' *Id.* pp. 2, 3. Tested by these principles, the agreement under consideration must be regarded rather in the light of a contract of suretyship than of guaranty, though the two engagements possess many similar features. It unequivocally states that the defendant Lazard agrees 'to become surety for Henry Block & Bro. for the specified sum of $10,000.' It declares that his undertaking is 'jointly and severaly with Henry Block & Bro.' It is concluded with the statement that 'this agreement (is) to bind (him) in the sum of $10,000 until the 15th day of October, 1891.' We find from the foregoing recitals—First, that it is a contract of suretyship in terms as it is in substance; second, that the amount for which the suretyship is undertaken is fixed and certain; third, that the contract is joint and several, and is operative as a solitary engagement, which is to be construed according to the principles that have been established by the Code for the interpretation of solitary obligations; fourth, that it is of limited duration. *As a contract of suretyship, notice of its acceptance on the part of the creditor seems not to be contemplated by the Code, no such requirement being specified in those articles treating of that subject.*"

In *Swope* v. *Forney,* 17 Ind. 385, the plaintiff brought suit upon a written contract by which one Swope agreed to purchase and deliver to one Forney one thousand sheep to be driven to Texas and there

delivered to Forney. The concluding paragraph of the contract being as follows:

> "For the consideration of the above one thousand dollars paid to Swope by Forney, for the faithful fulfillment of the foregoing contract, in the event of a failure on the part of Swope to fulfill the contract as specified in its provisions we, the undersigned, jointly and severally, bind ourselves in this obligation to pay Forney the sum of one thousand dollars, with interest, adding thereto all damages and expenses consequent upon the non-performance of the contract. In witness," etc.
>
> "Signed and sealed by B. K. Swope, B. K. Swope, Jr., W. S. Collier, and Clinton Walls."

The answers of the sureties are in seven paragraphs, raising different defenses. The fifth paragraph of their answer alleged "that the plaintiff did not on or before June 1, 1860, notify said sureties of the acceptance of said guaranty or of credit being given thereon."

To this paragraph a demurrer was sustained. The court said:

> "The demurrer was properly sustained to the fifth paragraph of the answer. We do not believe that the pleadings make a case in which any such notice as that named in said paragraph was necessary."

In *Saint* v. *Wheeler & Wilson Company,* 95 Ala. 362, 10 So. 539, the instrument sued on was a bond given by an agent to secure faithful accounting. In holding that notice of acceptance was not necessary, the court, among other things, said:

> "*The contract sued is not a guaranty, but one of suretyship.* Crosthwait and the other defendants, who undertake that Saint shall faith-

fully perform his contract with the company, *are sureties of Saint, and not guarantors.* The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and textwriters; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not, in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but when this responsibility is secondary, and collateral to that of the principal, they are guarantors.

It is, in other words, and in short, a primary undertaking on their part—not secondary and collateral—to pay to the Company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors; and their rights depend upon the law applicable to the former relation and not upon the law controlling the latter. One of the important differences in the operation, effect and discharge of the two contracts finds illustration in this case. *The undertaking of guaranty, in a case like this, is primarily an order, and does not become a binding obligation until it is accepted and notice of acceptance has been given to the* guarantor. Till this has been done, it cannot be said that there has been that meeting of the minds of the parties which is essential to all contracts. *Machine Co.* v. *Richards,* 115 U. S. 524, 6 Sup. Ct. Rep. 173; *Walker* v. *Forbes,* 25 Ala. 139. Being thus a mere offer, it may be recalled, as of course, at any time before notice of acceptance.

All this is otherwise with respect to the contract of a surety. He is bound originally, in all respects, upon the same footing as the principal. His is not an offer depending for efficacy upon

> acceptance, but an absolute contract, depending for efficacy upon complete execution; and its execution is completed by delivery. From that moment his liability continues until discharged in accordance with stipulations of the instrument, or by some unauthorized act or omission of the obligee violative of his rights under the instrument, or by a valid release. Nothing that he can do outside of the letter of the bond can free him from the duties and liabilities it imposes."

In *Fidelity Mut. Life Ins. Co.* v. *Steagall,* 111 Pac. 389, a bond was given, as in the case at bar, conditioned that the principal should pay all loans or advances made to him, and any and all moneys which might come into his hands as agent of the plaintiff. In holding that the defendants were sureties and not guarantors, and, therefore, that no notice of acceptance was required, the court said:

> "Counsel for defendants in error contend in their brief that the obligation of defendants created by the bond is that of guarantors, and not as sureties; that the evidence fails to establish that any notice of acceptance of their contract of guaranty was ever given by the company to them. It may be that it was upon this theory that a verdict was directed; but in *Hargis, et al.* v. *Fidelity Mutual Life Insurance Company* (recently decided by this court but not yet officially reported) a bond to the same company and in the identical language of the bond in the case at bar was considered and held to bind the signers thereof other than the principal as sureties, and not as guarantors, and that no notices of acceptances were required. Upon the authority of that case, the contention of defendants as to the notices of acceptance cannot be sustained."

In *Lane* v. *Mayer*, 44 N. E. (Ind.) 73, defendants delivered to plaintiff a writing as follows:

> "I hereby agree to hold myself responsible for, and agree to pay for any goods and merchandise which may be purchased of you by L. to the amount of $500."

It was held that the contract was an original undertaking, and a contract of suretyship as distinguished from guaranty, under which defendant was liable without notice of its acceptance by plaintiff.

The court, in so holding, said:

> "There was no averment that the appellees gave the appellant notice that they had accepted the obligation and would act upon it, nor does the evidence show that the appellee gave the appellant notice of their acceptance. It is insisted that the appellant cannot be held liable, in the absence of an averment and proof of such notice.
>
> If the instrument sued on is a strict guaranty, then notice of acceptance was essential before the appellant could be held liable. Without acceptance, the minds of the contracting parties could not agree upon the same terms, and no contract could be completed. Until accepted, and notice of such acceptance given, it would only be a naked proposition. *But, if the instrument is an original undertaking, it became binding upon delivery, and no notice of acceptance was necessary.* The distinction between a contract of guaranty and one of suretyship has been so often stated that it is unnecessary to repeat it here. *Shearer* v. *R. S. Peale & Co.*, 9 Ind. App. 282, 36 N. E. 455; *Bryant* v. *Stout* (Ind. App.) 44 N. E. 68. A contract, although purporting to be a guaranty, may be so worded as to make it an original undertaking. In such cases, the liability of the person executing it is analogous to that of a surety on a bond.

Following these recent cases, we are of the opinion that the contract declared on in this case is an original undertaking, and that it was not necessary to aver or prove notice of acceptance."

So in *Wheeler* v. *Rohrer*, 52 N. E. (Ind.) 780, a formal bond was executed in the penal sum of $1,000 conditioned,

> "That as the above-bound Philip S. Wheeler has by this instrument agreed to indemnify or make good any loss by reason of non-payment for goods received and sold by A. W. Templeton on account of the above-named Germantown Cigar and Tobacco Company, as their account may appear, now, if the said A. W. Templeton will not pay for all goods shipped by the Germantown Cigar and Tobacco Company when ordered by said A. W. Templeton, then said Philip S. Wheeler agrees to pay and indemnify said J. H. Rohrer, J. A. Brown, A. C. Kercher, Joe Endress, Jr., and David Rohrer, known as the Germantown Cigar and Tobacco Company * * * against all demands by reason of an agreement or covenant in the contract for the purchase of cigars from said Germantown Cigar and Tobacco Company, then this obligation is to be void, else to remain in force."

In holding that no notice of acceptance was necessary, because of the fact that this was a suretyship undertaking, the court said:

> "Under the special findings and conclusions of law, it is argued by appellant's counsel that these bonds are bonds of strict guaranty, and not original undertakings, and that the findings fail to show any notice of acceptance to Wheeler. Even if we should hold that the liability of appellant is that of a guarantor, notice of acceptance was unnecessary. If it was a contract of guaranty, it was an absolute guaranty, and not

an offer to guaranty, and, where an absolute guaranty is made, no notice of acceptance by the guarantee is required. *Bryant* v. *Stout*, 16 Ind. App. 380, 44 N. E. 68, and 45 N. E. 343, and cases there cited. Brandt, Sur. (2d. Ed.), Sections 193, 194. *But the bonds in question show an original undertaking on the part of appellant, and not a collateral guaranty.*"

In *Page* v. *White Sewing Machine Company*, 34 S. W. (Tex.) 988, a formal bond was given by an agent of the sewing machine company conditioned that the agent well and truly pay any and all indebtedness now existing or which may hereafter exist to the sewing machine company, and deliver to the latter, all notes, etc., then the obligation to be void, otherwise to be and remain in full force and effect. One of the points made against liability on this instrument was "that no notice of the acceptance of the same was ever given" the surety by the plaintiffs. The court held, however, that no notice of acceptance was necessary, because this was a contract of suretyship as distinguished from a guaranty, and in so holding entered into an elaborate examination of the law on this question.

In so holding, the court, among other things, said:

"Appellants insist upon treating the contract as one of strict legal guaranty. We cannot so regard it. It is a plain bond, executed by W. A. Page to the appellee, with G. G. Towles and others as securities. The contract is between the appellee, on the one side, and W. A. Page as principal, and Towles and others as sureties, on the other. The difference between a contract of guaranty and one of suretyship is not always clearly marked or well defined. In And. Law Dict., p. 497, the difference is thus stated: 'A

contract of suretyship is a direct liability to the creditor for the act to be performed by the debtor, whereas a guaranty is a liability only for his ability to perform this act. A surety assumes to perform the contract for the principal debtor, if he should not. A "guarantor" undertakes that his principal can perform; that he is able to perform. The undertaking of a surety is immediate and direct,—that the act shall be done, and, if not done, then he is to be responsible at once; but, from the nature of the undertaking of a guarantor, non-ability (insolvency) must be shown.' A guarantor insures the solvency of the debtor. A surety insures the debt itself. A surety must demand proceedings, with notice that he will not continue bound unless they are instituted, whereas a guarantor may rely upon the obligation of the creditor to use due diligence to secure satisfaction of his claim."

And after quoting from Brandt on Suretyship and Burge on Sureties, the court, continuing, said:

A guarantor is entitled to notice. Id., Section 157. *A surety is liable upon the delivery of the obligation. Garrett* v. *Insurance Co.*, 1 White. & W. Civ. Cas. Ct. App. Sec. 937. This distinction has been recognized and acted upon by our Supreme Court wherever the question has arisen, though we find no direct adjudication upon it. *This is a plain bond executed by a principal, with sureties, whereby the obligors bind themselves for the performance of certain* things by the principal in the bond."

———o———

"But we have here no such contract of guaranty, and the rules invoked by appellant do not apply."

In Sherman's estate, 25 Atl. (Pa.), 35, one H. purchased from S. judgments against a third person

and took an assignment thereof and to secure their payment, took a bond from S. conditioned that if the judgments should be paid by the judgment debtor, the obligation should be void, otherwise to remain in full force and virtue. It was held that S. was bound as surety on the judgments and not merely as guarantor and that the usual rules with reference to suretyship contracts applied. The court draws a remarkably clear distinction between suretyship and guaranty contracts.

In *White Sewing Machine Company* v. *Powell,* 74 S. W. (Ky.) 746, it was held, quoting from the syllabus:

> "A written obligation, by which sureties of a principal agreed to pay to a third person all money that the principal might thereafter owe to the third person for property to be sold to the principal by the third person, being an absolute guaranty, *bound the sureties without notice to them of the acceptance of the guaranty by the third person.*"

So in *Engler* v. *Fire Insurance Company,* 46 Md. 322, it was held that the fact of the execution of a bond and its transmission to and retention by the obligee, until its production at the trial, was sufficient evidence of its acceptance and approval by the obligee, and the sureties were not entitled to a notice of its acceptance and approval.

In the statement of the case, it is said:

> "Appeal from the Superior Court of Baltimore City. This was an action brought by the appellee against John Siebrecht, as principal, and August Engler and Adolph Engler, as sureties on a bond given for the faithful performance by John Siebrecht, of the duties of the of-

fice of secretary of the appellee. The condition of the bond was, 'that if the above named John Siebrecht shall faithfully perform his duties as secretary of the said Peoples' Fire Insurance Company of Baltimore, during the time he holds said office, and shall account for all the money which shall come into his hands as such secretary, then this obligation shall be void, otherwise the same shall remain in full force and virtue."

The following prayer for instruction to the jury was offered:

"If the jury find from the evidence that the defendant made and executed the bond offered in evidence, dated March 9, 1871, the duties of John Siebrecht, as the secretary of the plaintiff, it then became the duty of the plaintiff to notify the defendant of the acceptance and approval of the same; and if the jury should find that the plaintiff did not give the defendant any such notice until some three years after the same had been made, to-wit: about the month of March, 1875, when defalcation or breaches of duty had already been committed by Siebrecht as secretary, then the plaintiff is not entitled to recover."

This prayer was rejected and on appeal it was held properly so. The court thus holding that in the case of a surety bond, the surety was not entitled to notice of acceptance.

In *Walker* v. *Brinkley*, 42 S. E. (N. C.) 333, decided 1902, the same rule was laid down. In that case a bond, in the usual form, was given, conditioned that, if the agent of the principal should faithfully act as manager and perform the services required in that capacity in a reasonable, safe, competent and honest manner, the bond to be void. One

exception set out in the record was to dismiss the action for the reason that the evidence showed that the sureties had no notice of the acceptance of the bond. This exception was overruled, and the court held that the sureties were not entitled to notice.

In *Klosterman* v. *Olcott,* 41 N. W. (Neb.) 250, a bond, in the usual form, was given, providing that, if the condition therein set forth was performed, it should be void, otherwise to be and remain in full force.

The following instruction was given to the jury:

> "The paper writing admitted in evidence in this case, and upon which this action is based, is, in itself, a completed undertaking, and that notice of the acceptance of the same by the party of the second part, Henry E. Lewis, was not necessary to charge the obligors or guarantors therein, but that the execution of the instrument, and delivery of the same to the party of the second part, was all that was necessary for the parties to such contract to do in consummating the same."

It was held that this instruction was properly given, because the sureties on the bond were not entitled to notice of acceptance, as the undertaking was a direct and not a collateral promise.

In *Bank of the United States* v. *Dandridge,* 12 Wheat. 64, where a fidelity bond with sureties was given by a cashier of the Bank of the United States at Richmond, Virginia, and the question of the want of delivery and acceptance of the bond was raised, this court held that the delivery and acceptance was complete and binding, although no formal action of the directors of the bank had been taken approving

the bond as required by the rules of the bank charter.

The Supreme Court of Illinois in *Frost* v. *Standard Metal Co.*, 215 Ill. 240, has stated the law on the proposition in this point of our brief in one sentence. In discussing the question when notice of acceptance is necessary, the court said:

> "An acceptance is necessary to create liability if there is only a proposal to guarantee, but that rule has no application when the undertaking is primary and absolute."

This is the whole situation in a nutshell. A bond of indemnity is a *primary* undertaking as distinguished from guaranty which is a *secondary* undertaking. The Supreme Court of Illinois expressly states that the doctrine of notice of acceptance as laid down by this court in *Davis Sewing Machine Company* v. *Richards*, 115 U. S. 524, and by that court in *Cook* v. *Orne*, 37 Ill. 186, has no application to an original or primary contract, but only to contracts of guaranty which are secondary or collateral undertakings.

It seems hardly necessary to add anything to the numerous authorities above cited, holding that the rule of notice of acceptance is not applicable to an instrument of suretyship or indemnity.

It is manifest that it was never contemplated by the parties who executed the instrument at bar that they should have notice or that they expected any notice to be given them.

In the statement of facts certified to this court, by the Court of Appeals, it is said:

> "*Rieffler & Hall signed and sealed the indem-*

> *nity bond for the purpose therein expressed, and authorized Dooling to deliver to the Company through its Springfield agent."*

It was executed by them under their seals and delivered *authoritatively* and they knew at the time they delivered it that it was for the purpose of enabling Dooling to obtain a fidelity bond from the plaintiff in error and of protecting the plaintiff in error in executing as surety Dooling's official bond.

Having been duly executed and authoritatively delivered, no reason can be advanced why it should not be effective at once upon acceptance.

Under these circumstances, the doctrine of *Haywood* v. *Townsend,* 38 N. Y. Supp. 517; *Haupt* v. *James Cravens & Co.,* 120 S. W. 541; *Boyd* v. *Agricultural Ins. Co.,* 76 Pac. 986, and other cases above cited is clearly apposite. As stated by the Supreme Court of New York in *Haywood* v. *Townsend*:

> "They signed and executed the bond for the purpose of enabling him to get that money. When they (the sureties) delivered it to him (their principal) and left it with him after having executed it, it was, so far as any act of theirs necessary to be done to fix their liability upon the bond, complete. Their obligation was something more than that of an endorser upon a note, or the guarantor of the payment of money."

In the Haywood case the sureties as above shown did not deliver the bond to the obligee at all, but delivered it to their principal and left it with him to be delivered to the obligee.

In the Haupt case above cited, the bond was forwarded by mail to the obligee who wrote the principal acknowledging receipt, but at the same time

stated they would inquire as to the financial standing of the sureties, *and if that inquiry proved satisfactory, the bond would be accepted.* It does not appear that they made any further inquiry and gave no notice to the sureties of the acceptance of the bond, yet the court held the bond to be effective because the retention of it by the obligee was equivalent to an acceptance.

In the Boyd case the situation is even stronger. When the bond was forwarded to the obligee, it stated that the bond was not satisfactory and complained that the sureties were not satisfactory. Yet the court said:

> "The acceptance of the bond must be presumed from the fact that it was retained by the obligee and the agent continued in the discharge of his duties."

All of these cases clearly show that when the obligors in a bond execute and deliver it and it is retained by the obligee who thereupon acts in reliance upon it, the obligors cannot complain that it is not effective because the obligee has not notified them of his acceptance. Any different doctrine would greatly weaken the force and effectiveness of bonds and other writings obligatory. Just why it should be contended that the doctrine of notice of acceptance should be applied to a specialty in the form of a bond any more than to a deed, mortgage or other instrument under seal, we do not know. Possibly it is because some courts have used the term "guaranty" so loosely that it has been applied to instruments of this character.

Some reliance is placed upon the fact that Dooling did not himself sign the bond.

It is ~~drawn~~ clear from a reading of the bond that it was drawn with the intention of having him sign it, but it is not claimed his failure to do so released the defendants in error. Indeed that fact does not affect in any way the rights or obligations of the parties.

In *Trustees of Schools* v. *Sheik*, 119 Ill. 579, at 582, 584, the Supreme Court of Illinois held that the failure of the principal to sign the bond did not affect the relations and obligations of the parties in any manner. The court said:

> "The fact that the principal obligor in this case failed to sign the bond was a mere technicality which ought not to affect the rights of any of the parties concerned."

Furthermore, the duty and obligation of Dooling is affirmatively provided for in the bond and it is one which in his case the law would imply without an express undertaking on his part. Furthermore, he himself procured the bond, delivered it to the obligee and on the strength of it obtained the fidelity bond in which he himself was principal.

IV.

IT IS NOT NECESSARY THAT THE INDEMNITORS SHOULD RECEIVE ANY BENEFIT AS A CONSIDERATION TO RENDER THEM LIABLE. THE LIABILITY INCURRED BY THE INDEMNITEE AND THE HARM AND INJURY SUFFERED BY IT CONSTITUTE A VALID AND SUFFICIENT CONSIDERATION FOR THE BOND OF INDEMNITY.

In the statement of facts in the certificate of the Court of Appeals, is the following:

> "No pecuniary consideration was paid to, or received by Rieffler or Hall for executing the indemnity bond."

We can hardly believe that the Court of Appeals intended to imply that in a transaction of this character a pecuniary consideration must be paid to the indemnitors in order to make the bond of indemnity valid and enforcible.

In the State of Illinois the common law doctrine that a seal imports consideration is still the law, and when a bond or writing obligatory is executed under seal it is valid and enforcible without any pecuniary consideration. *Chicago Sash Door & Blind Co.* v. *Haven*, 195 Ill. 474, 63 N. E. 158.

However, in the case at bar there was, in fact, a consideration for the execution by the indemnitors of the bond of indemnity, although it was not in the form of money paid to them by the indemnitee.

The consideration consisted in the liability assumed by the indemnitee at the implied request of the indemnitors and upon the strength of the bond of indemnity. In the certificate of the Court of Appeals it is said:

> "On March 10, 1905, the Company in reliance on Rieffler and Hall's indemnity bond, executed the Dooling official bond as surety and sent it to its Springfield agent. On March 12, 1905, Dooling signed his official bond as principal and it was thereupon delivered to the Court of Honor."

When the plaintiff in error, in reliance upon the indemnity bond, executed Dooling's official bond as surety, it assumed a liability which constituted a

valid and lawful consideration to support the bond of indemnity.

In *Chapin* v. *Merrill,* 4 Wend. 657, the court said:

> "The promise in this case was original and not a collateral undertaking; but had it a sufficient consideration? It is not disclosed that the defendant received any benefit from what was done by the plaintiff; nor is it necessary, as I conceive, that he should to make him liable. In *Tomlinson* v. *Gill,* and *Read* v. *Nash,* it does not appear that the defendants did or could derive any benefit from their undertakings; yet they were held liable on them. The consideration was the harm to the plaintiffs. In this case the consideration was the assumption of the plaintiff of a responsibility on which he was obliged to pay about six hundred dollars. This is an abundant consideration for the undertaking on which this action is brought."

In *Emerson* v. *Slater,* 22 How. 28, this court said (p. 43):

> "Nothing is better settled than the rule, that if there is a benefit to the defendant, and a loss to the plaintiff, consequential upon and directly resulting from the defendant's promise in behalf of the plaintiff, there is a sufficient consideration moving from the plaintiff to enable the latter to maintain an action upon the promise to recover compensation. 2 Addison on Con., 1002, and cases cited. Other authorities state the proposition much stronger, authorizing the conclusion that benefit to the party by whom the promise is made, or to a third person at his instance, or damage sustained at the instance of the party promising, by the party in whose favor the promise is made, is sufficient to constitute a good and valid consideration on which to maintain an action. *Violet* v. *Patton,* 5 Cr., p. 150; Chitt. on Con., p. 28; *Townsley* v. *Sumrall,* 2 Pet., p. 182."

CONCLUSION.

Having given the definitions of a bond or contract of *indemnity* and the characteristics distinguishing it from a contract of *guaranty*, we shall endeavor to analyze and classify the instrument before the court, following the sequence in the brief.

I.

(A) *A bond of indemnity is an engagement "to secure or save harmless against loss or damage of a specified character," it is "something given to a person to prevent his suffering damage": While a guaranty is a promise to answer for the payment of some debt or the performance of some duty in the case of the failure of another person who is himself in the first instance liable for such payment or performance."*

The cases cited in our brief show (what is a matter of common knowledge) that the commonest and best known form of indemnity is that given by a principal to his prospective surety or bail, a form of contract known to the law courts for many hundreds of years.

Such was the instrument at bar, given by Dooling to "save harmless and keep indemnified the said United States Fidelity and Guaranty Company against all suits, actions, debts, damages, • • •

that shall or may at any time hereafter happen or accrue to the said United States Fidelity and Guaranty Company, its successors or assigns for or by reason of the suretyship of the said United States Fidelity and Guaranty Company as aforesaid."

Upon its face the bond is conditioned to save it harmless from loss by reason of its execution as surety of Dooling's official bond as recorder of the Court of Honor.

There is no covenant to pay any debt or perform any duty *or do any affirmative act whatsoever.*

The instrument from beginning to end is conditioned to protect it from loss by reason of its suretyship. Every condition is one of indemnity.

This seems so self-evident from the instrument itself that we hesitate to add anything to what has already been said.

Indeed we may ask what other kind of a condition could be inserted in a bond to protect a surety for acting as such?

(B) *Bonds of indemnity are original and primary obligations not within the Statute of Frauds: While contracts of guaranty are secondary or collateral undertakings and are within the scope of the statute.*

A reading of the cases cited under this point shows conclusively that this instrument is an original and primary obligation and not a secondary or collateral one. The defendants in error could have been held liable even if their obligation had been a verbal one.

The facts in certain of the cases cited are not only similar to the one at bar, *they are identical with it.*

It does not seem to require argument or demonstration when two cases are absolutely identical. Therefore, we shall not indulge in any.

The instrument at bar was certainly primary in sequence of time and in every other way. At the time it was entered into by the defendants in error there was nothing else in existence to which it could be collateral.

There never was a "debt" at any time and there was no undertaking of any kind by any one to which it could possibly be "secondary" or "collateral."

If this is not absolutely certain an application of the "James, John and Richard" test of Justice Shope in *Resseter* v. *Waterman*, 151 Ill. 169, page 179, ought to be absolutely convincing.

(C) *A guarantee must ordinarily exhaust his remedies against the person primarily liable before resorting to his guarantor: But an indemnitee can hold his indemnitor without first seeking reimbursement from any third person.*

Defendants in error will undoubtedly argue (as they did in the Court of Appeals) that Dooling was "primarily liable" and plaintiff's in error should have exhausted their remedies against him.

No one denies that Dooling would have been liable to indemnify his surety whether the instrument at bar had been executed or not; but the complete answer to that contention is this, the moment Dooling permitted his surety to suffer loss and damage, *the bond of defendants in error was breached:* its conditions broken!

It would then certainly be anomalous if an obligor could not be sued on his bond upon a condition broken, which by its terms makes it "in full force and effect."

No one has contended that Dooling did save the plaintiff in error harmless; no one has denied that he did not. Having failed to save it harmless, the condition broken, like any other condition broken, gave the obligee an immediate right of action.

(D) *An indemnitee must have actually paid a judgment or given his own obligation to the creditor which has been accepted as payment before he can maintain an action upon the instrument of indemnity: While a guarantee may maintain an action against a guarantor to compel payment of the debt itself as stated in Point* ("C").

While it does not appear from the certificate of the Court of Appeals, the record shows that the plaintiff in error was sued by the Court of Honor for moneys embezzled by Dooling as recorder. That a judgment was rendered against it (after notice to the defendants in error as its indemnitors to defend) which it was abliged to and did pay. The condition of the bond was therefore broken and the plaintiff in error had actually suffered loss before bringing this suit. Suppose the situation had been different and the plaintiff in error immediately upon being sued upon Dooling's official bond had in turn sued the defendants in error as Dooling's guarantors before paying any money (alleging, of course, that Dooling was insolvent).

Would the defendants in error have contended

under those circumstances that the instrument was a *guaranty* and not *indemnity!*

It is hardly conceivable, but in any event the instrument is so conditioned that no action could be maintained until there had been a failure to "save harmless" and when that occurred, a cause of action accrued at once.

Any other construction is repugnant to the whole instrument, and as stated by Mr. Justice Shope in the Resseter case (*supra*) "your liability begins only when James has paid him."

(E) *While a guarantor's undertaking is for the benefit of the creditor, the undertaking of a surety's indemnitor is not. The creditor cannot maintain any action upon it.*

In the case at bar, the Court of Honor (to which Dooling, as principal, and plaintiff in error, as surety, gave their bond), occupies the position analogous to the creditor.

It is the party about which the whole transaction centered. The liability of the plaintiff in error as surety was undertaken to protect it. It was the *raison de etre* for the undertakings of all.

Yet surely it does not require argument to demonstate that the Court of Honor could not enforce the instrument at bar. That was entered into to indemnify the plaintiff in error as surety and the Court of Honor "cannot maintain any action upon it."

(F) *As a general rule an "indemnitor" is neither a "guarantor" nor a "surety.". He is a "principal," although he is frequently referred to by the courts as a "surety."*

Although Dooling was the plaintiff in error's principal and requested it to act as his surety, the real request and the one which induced it to act was the one embodied in the bond of the defendant in error.

Without that the plaintiff in error would not act. When the defendants in error by the authorized delivery of their bond undertook to save it harmless it in turn undertook the liability as surety on Dooling's bond.

Therefore as stated in *Wise* v. *Miller*, cited in our brief, the defendants became quasi principals inducing plaintiff in error to act at their behest. Their relation is in no sense analogous to that of guarantors.

(G) *Historically, contracts of indemnity are creations of the common law, and are usually specialties (except the implied obligation created by law on the part of a principal to indemnify his surety when no express obligation has been given); while contracts of guaranty are commercial contracts having their origin in the rules of the law merchant and are usually simple contracts.*

It is clear from what we have already said and do not desire to repeat, that the transaction here is one of purely common law origin, and in no sense a commercial contract.

It is peculiarly a transaction recognized by the law courts from early times and the form of instrument (specialty) is one which the law courts are and always have been accustomed to deal with.

It is a writing obligatory under seal with a con-

dition of defeasance, a form of contract which merchants in early years were little familiar with and rarely, if ever, used in England in guaranty contracts.

All that is necessary to demonstrate this (if we have not already succeeded in doing so) is a study of the early cases in England and the United States.

Tested then by all the definitions, logical and analytical, the instrument is clearly one of indemnity.

If we have demonstrated this to be true, then under the rule stated in Point III, *"The doctrine of notice of acceptance is not applicable to bonds of indemnity or to any form of instrument which is an original undertaking.*

A bond of indemnity or other original undertaking, when executed, delivered and acted upon, becomes effective." No notice of acceptance of the bond of defendants in error was required to be given.

We respectfully submit that question (1) should be answered in the affirmative, with the explanation that the instrument is a contract of indemnity and not guaranty. Question (2) should be answered, "No." The affirmative answer to question No. 1 will probably make an answer to No. (3) unnecessary.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, A. D. 1914

THE UNITED STATES FIDELITY & GUARANTY COMPANY, *Plaintiff in Error,* vs. CHARLES J. REIFLER and JAMES A. HALL, *Defendants in Error.*	Certificate from the United States Circuit Court of Appeals for the Seventh Circuit, certifying questions of law upon which it desires instruction.

BRIEF OF THE ARGUMENT

I.

THE INSTRUMENT IN SUIT WAS A MERE OFFER AND NOT AN ABSOLUTE AND COMPLETE OBLIGATION UNDER THE FACTS CERTIFIED IN THE CASE.

Davis v. Wells, 104 U. S., 159;

Davis v. Richards, 115 U. S., 524;

Deering v. Mortell, 16 L. R. A. (N. S.) 363;

Barnes Cycle Co. v. Reed, 84 Fed., 603; 91 Fed. Rep., 481;

20 Harvard Law Review, 486;

Lachman v. Block, 15 So. Rep. (La.) 649; S. C., 47 La. Ann., 505.

II.

THE INSTRUMENT IN SUIT IS NOT A BOND OF INDEMNITY. WHILE UNDER THE FACTS CERTIFIED IT DOES NOT EVIDENCE A COMPLETED CONTRACT OF ANY KIND, YET AS AN INSTRUMENT IT IS, AS TO THE DEFENDANTS WHO SIGNED IT—AS DISTINGUISHED FROM DOOLING WHO DID NOT SIGN IT—ONE OF GUARANTY AND NOT OF INDEMNITY.

Vol. 16 Am. & Eng. Encycl. of Law, page 168;

Vol. 22 Cycl. of Law & Pro., pages 79 and 80;

Vol. 1 Am. & Eng Encycl of Law, page 1128;

Pingrey on Suretyship, Section 4;

Vol 20 Cycl. of Law & Pro., pages 1397 and 1400;

Kearnes v. Montgomery, 4 W. Va., 29;

Courtis v. Dennis, 7 Metcalf, 518;

Hall v. Weaver, 34 Fed. Rep., 106;

Brandt on Suretyship, Section 1;

Halsbury's Laws of England, Vol. 15, page 444.

III.

MUTUALITY OF ASSENT IS ESSENTIAL TO EVERY CONTRACT AND REQUIRES THE ASSENT OF A PARTY TO WHOM A PROPOSAL IS MADE TO BE SIGNIFIED TO THE PARTY MAKING IT, IN ORDER TO MAKE A BINDING CONTRACT. IN THIS CASE THERE WAS NO SIGNIFICATION OF ASSENT OR NOTICE OF ACCEPTANCE TO THE DEFENDANTS OF THE INSTRUMENT IN SUIT AND HENCE AS SAID INSTRUMENT WAS UNDER THE FACTS CERTIFIED MERELY OFFERED FOR ACCEPTANCE OR REJECTION, IT NEVER BECAME A BINDING OBLIGATION, REGARDLESS OF THE QUESTION AS TO WHETHER IT WAS IN FORM AN INSTRUMENT OF GUARANTY OR OF INDEMNITY.

Davis v. Wells, 104 U. S., 159;

Davis Sewing Machine Co. v. Richards, 115 U. S., 524;

Lachman v. Block, 15 So. Rep. (La.) 649;

Louisiana Code, Sec. 1797;

Deering v. Mortell, 16 L. R. A. (N. S.) 353;

Bishop v. Eaton, 161 Mass., 496; 12 Am. St. Rep., 437; 22 Cyc., 81;

Anson on Contracts, 15, 16;

Frost v. Standard Metal Co., 215 Ill., 245; same case, 116 Ill. App., 642;

Ruffner v. Love, 33 Ill. App., 601;

Newman v. Streator Coal Co., 19 App., 602;

Sears v. Swift & Co., 66 Ill. App., 496;

Myer v. Ruhstadt, 66 Ill. App., 346;

Acme Mfg. Co. v. Reed, 197 Pa. St., 359;

IV.

THE FACT THAT THE INSTRUMENT IN SUIT WAS IN THE FORM OF A BOND UNDER SEAL DOES NOT TAKE IT OUT OF THE GENERAL RULE REQUIRING NOTICE OF ACCEPTANCE.

Davis v. Wells, 104 U. S., 159;

Hall v. Weaver, 34 F. R., 104;

Burke v. Delaney, 153 U. S., 235;

Jordan v. Davis, 108 Ill., 336;

Philadelphia R. R. Co. v. Howard, 13 Howard, 334;

Rountree v. Smith, 152 Ill., 493;

Stanley v. White, 160 Ill., 605;

Ware v. Allen, 128 U. S., 597;

Pawling v. U. S., 4 Cranch, 219;

(Wigmore) on Evidence, Vol. 4, Secs. 2408, 2410, 2442;

Curry v. Colburn, 99 Wis., 319; 74 N. W., 778.

ARGUMENT

I

THE INSTRUMENT IN SUIT WAS A MERE OFFER AND NOT AN ABSOLUTE AND COMPLETE OBLIGATION UNDER THE UNDISPUTED FACTS CERTIFIED IN THE CASE.

A considerable part of Plaintiff in Error's Brief is devoted to a discussion of the difference between absolute guaranties and guaranties which are held to be mere offers or overtures to guaranty, the purpose being to show that it is only in the case of mere offers that notice of acceptance is necessary.

The principle contended for when properly applied may be conceded and the question in each case is therefore to determine whether under the facts a mere offer or a completed contract of guaranty is involved. In the case at bar we see no room for argument under the facts existing and certified upon this question. In the certificate the Court of Appeals states, "Dooling delivered the indemnity bond to the agent, who thereupon forwarded it to the Home Offie of the Company stating that Riefler and Hall were financially good and recommending that the Company accept their indemnity bond."

Thus it is clear that the bond in suit was merely proffered with a recommendation of its acceptance, and

it was open to the Plaintiff to take what action it chose with respect to it, eiher to reject it or accept and notify of acceptance. The bond in suit was signed on February 25th, and was mailed to Baltimore and the surety bond executed by Plaintiff for Dooling was not executed till March 10th following, so that during the interval, making proper allowance for time in the mail, the bond in suit was under consideration by the Plaintiff at Baltimore for the purpose of deciding upon its acceptance or rejection. It is specially found and certified that there was no antecedent agreement on the part of the Plaintiff to accept it. The statement of the facts carries the argument with it that the instrument in suit when signed by Defendants did not evidence a completed contract of any kind, but merely an offer, and the Defendants could not tell unless notified in some way that the offer had been accepted, or that Plaintiff would furnish Dooling a surety bond on the strength of it.

Suppose hat the Plaintiff upon consideration of the bond in suit had decided that it was not satisfactory and had rejected it, certainly it could not be contended that it was an absolute guaranty and evidenced a complete contract in that case, and yet so far as Defendants knew under the facts certified, the Plaintiff might have taken that very action, for they were never advised of its acceptance. Counsel for Plaintiff refer to the case of

Deering v. Mortell, 16 L. R. A. (N. S.) 353. The principle announced in that case is that a contract though absolute in form guaranteeing the fulfillment of an agent's contract, made without consideration, in the absence and without the request of the obligee, is a mere offer which requires acceptance to be binding. In the note to this case on page 354 it is said, "Only where the party cannot know beforehand whether he is to be ultimately liable or not or to what extent, is it necessary, in order to charge him that he should have reasonable notice." So that the case at the bar falls under the requirement of notice within the authority cited by Plaintiff because these Defendants certainly could not know beforehand whether the instrument they had signed would be accepted or not. In the same annotation we also find it stated, (page 354):

> "When the nature of the guaranty is determined the rule seems to be well settled that, if the guaranty is direct, and the thing guaranteed definite in its amount, and known to the guarantor at the time he gives his guaranty, notice of acceptance need not be given; for the guarantor knew when he made the guaranty the full extent of his liability. But, when the guaranty is collateral, and the debt guaranteed yet to be created, the amount of which is uncertain and may be variable, and cannot be known to the guarantor at the time he makes the guaranty, notice to him within a reasonable time of the guarantee's acceptance of the guaranty is necessary or the

> guarantor will be discharged; for he cannot, without such notice, know that the guaranty is accepted, or protect himself from loss by the principal debtor. In short, the distinction running through all the modern cases is between a proposition or overture towards a guaranty, and the guaranty itself, when perfected by the assent of both parties; and interpretation is the crucial test by which the necessity or non-necessity of notice of acceptance is determined."

In the present case, the guaranty is collateral, the obligation guaranteed was yet to be created, the amount was necessarily uncertain and could not be known to the guarantors at the time they signed the bond in suit, so that all the conditions in the note, requiring notice of acceptance, existed here.

"The true test," says the South Dakota Supreme Court in *Deering* v. *Martell, supra,* "We think in determining whether it is in fact an offer of guaranty or an absolute guaranty, is whether there is this mutual assent," citing *Davis Sewing Machine Co., v. Richards,* 115 U. S. 524, as the leading case on the subject.

An examination of the cases will disclose that the instruments in question which were held to be mere offers were absolute in form. Such was the instrument in *Davis* v *Richerds, supra, Barnes Cycle Co.* v *Reed,* 84 *Fed. Rep.* 603, *Deering v. Mortell, supra.* "It is true

that some Courts undertake to distinguish between an absolute guaranty and an offer to guaranty; but since the so-called absolute guaranty until accepted is no more than an offer to guaranty this attempted distinction is without foundation.

Harvard Law Review, Vol. 20, P. 486.

The mere form of the instrument is not therefore the test at all but the fundamental principle of mutuality of assent. The instrument may be perfectly absolute in form and yet unles it should recite a consideration, thereby evidencing assent, it may be a mere offer requiring notice of acceptance to give that mutuality of assent required in every contract.

It woud be a profitless task, we think, to follow the Plaintiff through all the cases cited, because in the final result the test between mere offers of guaranty and complete or absolute guaranty rests where this Court has said it does, upon the solid basis of mutuality of assent. By this test, under the facts of this case the bond in suit, when tendered for acceptance with the recommendation of Plaintiff's agent, with no antecedent agreement that it would be accepted, no consideration recited, no request by the Defendants, was nothing more than an offer requiring acceptance and notice to make it a binding obligation.

II.

THE INSTRUMENT IN SUIT IS NOT A BOND OF INDEMNITY. WHILE UNDER THE FACTS FOUND IT DOES NOT EVIDENCE A COMPLETED CONTRACT OF ANY KIND, YET AS AN INSTRUMENT IT IS, AS TO THE DEFENDANTS WHO SIGNED IT—AS DISTINGUISHED FROM DOOLING WHO DID NOT SIGN IT—ONE OF GUARANTY AND NOT OF INDEMNITY.

The condition of the bond in suit is that *if Dooling shall indemnify and save harmless and keep indemnified* the United States Fidelity and Guaranty Company, then the obligation is to be void. The condition is not that if Hall and Riefler, the defendants in error shall indemnify, etc. The primary liability, therefore, expressly and in terms contemplated by the bond, is on the part of Dooling to indemnify the Surety Company. If Dooling fails to indemnify, then the obligation is to be in force and effect, that is, the secondary or collateral obligation of the signers of the bond then arises.

Let us apply the distinctions taken from cases, and textbooks cited in Plaintiff in error's brief.

From 16 Am. & Eng. Enc. of Law, 168:

"(1) An indemnity contract is an agreement between two parties whereby one agrees to indemnify and save harmless the other from loss

> or damage in connection with some particular transaction, or to protect him against liability to or the claim of a third person."
>
> "(2) While the undertaking of a guarantor is to protect the promisee against loss or damage through the failure of a third person to carry out his obligatons to the promisee."

With this distinction as quoted before them, counsel argue that the above definition of a guarantor does not fit this case; that the Plaintiff is the promisee but that there was no obligation to the Plaintiff. "Dooling," (they say in their brief in the Court of Appeals) "owed the Plaintiff nothing as his undertaking being to a *third person.* (Court of Honor.)"

Counsel seem to be confused and to treat this bond as though the condition were that defendants in error were to keep the plaintiff indemnified, whereas the plain language of the bond makes the condition that Dooling shall keep the plaintiff indemnified. The plaintiff is the promisee; Dooling's recited obligation is in terms to the promsee to keep it indemnified, and not, as counsel say, to a third person. Nothing whatever is said in the bond of an obligation on the part of Dooling to the Court of Honor. So that it is clear that the definition of a guarantor exactly does fit the position of Defendants—

without, of course, admitting that it ever became operative as an instrument of guaranty.

Again in *Courtis v. Dennis*, 7 Metcalf 510, also cited by Plaintiff in Error, the Court says the true distinction between a surety and a guarantor is that a surety is *in the first instance* answerable for the debt for which he makes himself responsible, while a guarantor is only liable where default is made by the party whose undertaking is guaranteed.

Under the bond in question the liability, if any, of Defendants could not arise until default had been made by Dooling by failing to indemnify the Plaintiff, and then the liability of Defendants would be in damages on the bond in suit and not the primary liability to indemnify. Counsel also quote 22 Cyc. pp. 79-80:

> "C. *Distinguished from Guaranty and Suretyship.* Contracts of indemnity are distinguished from those of Guaranty and Suretyship in that in indemnity contracts the engagement is to make good and save another from loss upon some obligation, which he has incurred or is about to incur *to a third person* and is not as in Guaranty and Suretyship a promise *to one to whom another is answerable.*"

Also Brandt on Suretyship and Guranty, Vol. 1, Sec [illegible], and other authorities to the same effect.

Here the promise of the defendants, if any, to the United States Fidelity and Guaranty Company is a promise to one to whom another (Dooling) is answerable and is not to save harmless said Company from loss which it has incurred or may incur to some third person (Court of Honor). It therefore clearly falls, as an instrument, within the above distinguishing test of guaranty and not indemnity.

Again take the definition of Guaranty quoted by Plaintiff in Error from 14 Am. & Eng. Encycl. of Law, p. 1128.

> "1. *Definition.* A Guaranty is a promise to answer for the payment of some debt or the performance of some duty, in the case of the failure of another person who is himself in the first instance liable to such payment or performance."

Apply this definition to the bond in suit and—saving always the fact that no notice of acceptance was given and that therefore it never became operative—we find that it exactly fits the terms of the bond. Dooling is in the first instance, to keep the Plaintiff indemnified and if he fails the obligation is to remain in force, i. e., the liability of the Defendants which is secondary to Dooling's is to arise, and that would be a liability in damages and not a primary liability to indemnify.

Again take the definition from Cyc. Vol. 20, p. 1397, also cited:

> "A Guaranty is a collateral undertaking by one person (the Defendants in Error) to be answerable for the payment of some debt or the performance of some duty or contract for another person who stands first bound to pay or perform" (the duty or contract, recited, on the part of Dooling, who stands first to perform it, of indemnifying the Plaintiff). The words in brackets are of course ours.

Pingrey on Surety and Guaranty, Section 4, cited by Plaintiff in Error, says:

> "In a strict guaranty, the guarantor does not undertake to do the thing which his principal is bound to do, but his obligation is that the principal shall perform such act as he is bound to perform or in the event he fails that the guarantor will pay such damages as may result from such failure."

Such would be the effect, if any, of the bond in suit, if it had become operative. It contemplates by recital the primary obligation of Dooling to indemnify the Plaintiff, but if he fails that the Defendants shall be liable in damages by reason of Dooling's inability.

De Colyer's definition of a guaranty is also cited:

> "A guaranty is a collateral agreement to answer for debt, default or miscarriage of another,"

and appears to fit exactly the liability contemplated by a bond such as that in suit.

In Halsbury's Laws of England, Vol. 15, p. 444, an Indemnity Contract is thus defined:

> "An indemnity is a contract, express or implied, to keep a person who has entered into or who is about to enter into a contract or incur any other liability indemnified against loss *independently of the question whether a third person makes default.*"

The case of *Hall v. Weaver,* 34 Fed. Rep. 106, cited by Mlaintiff in Error is very different from the present case. In that case the Defendents were bound to the same obligation and by the same instrument as the principal. Judge Deady says, after quoting from Brandt on Suretyship, *Kearnes* v. *Montgomery,* 4 W. Va. 29 and *Courtis v. Dennis,* 7 Met. 518, "Now the undertaking of Weaver within all these definitions and distinctions is that of a surety. He became absolutely bound in the same writing and on the same consideration with his principal, Owens, to pay the plaintiffs whatever sums of money they might advance for him, concerning which he might make default. In other words, his contract and liability are the same as his principal's. He bound himself to do exactly what Owens did; and whatever was a breach of the bond as to

Owens, was so as to Weaver. His undertaking was an original one, joint and several with Owens, and in no sense collateral to it.

"On the other hand, this contract differs from that of a guarantor, which is separate from and collateral to that of the principal, and founded on a distinct consideration."

In the present case, the defendants are not bound by the same instrument as Dooling who is not a party to it and does not sign it. These defendants did not bind themselves to do the same thing as Dooling because the bond in suit contemplates by recital that Dooling is to indemnify the plaintiff, whereas the defendants do not contract to indemnify, but only to pay damages in case of Dooling's inability to indemnify. Defendants' liability is not an original one, joint and several with Dooling, but a collateral one. This case, therefore, is not an authority in favor of plaintiff, but very distinctly in favor of Defendants. The principle upon which it is decided makes the liability of these Defendants that of Guarantors—had the bond been accepted and notice of acceptance given— and not that of sureties or indemnitors.

We submit, therefore, that the law cited by Plaintiff in Error when appied to the condition of the bond in

suit, instead of supporting the argument of Plaintiff in Error, very clearly refutes it and demonstrates that the instrument is one of guaranty and not of indemnity.

The argumentative question put by counsel for Plaintiff in Error in their argument before the Court of Appeals is readily answered. "Nor can the undertaking of the Defendants sued on herein" they say, "be claimed to be 'collateral or secondary;' secondary to what? Dooling owed the Plaintiff nothing." The answer is that it was secondary to Dooling's obligation to keep the Plaintiff indemnified.

Herein lies the fallacy of Plaintiff's argument. *It was Dooling and not these Defendants* who were by the terms of the bond to indemnify the Plaintiff. Of course the body of it could have been so written, if such had been the intention and purpose, and if the Defendants had been willing to sign it if so written, as to have made it an instrument of indemnity on the part of the signers, but it was not so drawn, and plainly as written did not contemplate a primary obligation of indemnity but if anything, a secondary obligation of guaranty.

We submit that the instrument sued on, had it become operative by notice of acceptance, would have been, under the law and its condition, clearly, not one of indemnity but of guaranty.

III.

MUTUALITY OF ASSENT IS ESSENTIAL TO EVERY CONTRACT AND REQUIRES THE ASSENT OF A PARTY TO WHOM A PROPOSAL IS MADE TO BE SIGNIFIED TO THE PARTY MAKING IT, IN ORDER TO MAKE A BINDING CONTRACT. IN THIS CASE THERE WAS NO SIGNIFICATION OF ASSENT OR NOTICE OF ACCEPTANCE TO THE DEFENDANTS OF THE INSTRUMENT IN SUIT AND HENCE AS SAID BOND WAS UNDER THE FACTS FOUND MERELY OFFERED FOR ACCEPTANCE OR REJECTION, IT NEVER BECAME A BINDING OBLIGATION, REGARDLESS OF THE QUESTION AS TO WHETHER IT WAS IN FORM AN INSTRUMENT OF GUARANTY OR OF INDEMNITY.

The rule of law applicable to all contracts is, that before an offer can become a binding contract, no matter what its form may be, it must be accepted by the other party and in cases of offers where the obligee is to determine upon the solvency or credit of the obligor or person making the offer he must, if he makes up his mind to accept the offer or bond, notify the obligor or person making the offer of that fact before the offer or bond becomes a binding contract. As said by Anson on Contracts, Star page 15, "Nor can an acceptance which does not go beyond an uncommunicated mental determination create a binding contract *either by reason of any form in which the offer is framed* or because the intention to accept did in fact exist," and on the next

page illustrates this principle as follows, "In a case of the reign of Edward IV, it was argued that where the produce of a field was offered to a man at a certain price if he was pleased with it on inspection, the contract was concluded and the property passed when he had seen and approved of the matter of the sale." (Year Book 17, Ed. IV; Blackburn on Sales 190). But Brian, C. J., said, 'It seems to me the plea is not good without showing that he had certified the other of his pleasure; for it is a trite learning that the thought of man is not triable, for the Devil himself knows not the thought of man; but if you had agreed that if the bargain pleased you then you should signify to such an one, then I grant you need not have done more, for it is a matter of fact.' "

As said by the Supreme Court of Louisiana in Lachman v. Block, 47 La. Ann. 505, citing the Louisiana Code Art. 1797:—

> "Consent being an operation of the mind, it can have no effect in producing the contract unless evinced in some manner that shall cause it to be understood by the other party."

This Court in the case of *Davis v. Wells-Fargo & Company*, 104 U. S. 159, and the cases there cited, stated the rule in regard to offer and acceptance applicable to guaranty contracts and in that case this Court has considered the rule of giving notice *as not peculiar to con-*

tracts of Guaranty but as a rule *inhering in the very nature and definition of every contract* which requires the assent of the party to whom a proposal is made, to be signified to the party making it, in order to constitute a binding promise.

In that case the question when notice of acceptance is necessary was fully and clearly discussed. The Court says:

> "It becomes necessary to inquire precisely what has thus been settled, and that rule of decision is applicable to the facts of the present case.
>
> In *Adams* v. *Jones*, 12 Pet. 213, Mr. Justice Story, delivering the opinion of the court, said:
>
> 'And the question which, under this view, is presented, is whether, upon a letter of guaranty, addressed to a particular person or to persons generally, for a future credit to be given to the party in whose favor the guaranty is drawn, notice is necessary to be given to the guarantor that the person giving the credit has accepted or acted upon the guaranty and given the credit on the faith of it; we are all of the opinion that it is necessary; and this is not now an open question in this court, after the decisions which have been made in *Russell* v *Clark*, 7 Cranch, 69; *Edmonston* v *Drake*, 5 Pet. 624; *Douglas* v *Reynolds*, 7 Pet. 113; *Lee* v *Dick*, 10 Pet. 482; and again recognized at the present term in the case

> of *Reynolds* v. *Douglas*, 12 Pet. 497. It is in itself a reasonable rule, enabling the guarantor to know the nature and extent of his liability, to exercise due vigilance in guarding himself against losses which might otherwise be unknown to him, and to avail himself of the oppropriate means in law and equity to compel the other parties to discharge him from further responsibility. * * * If, therefore, the questions were entirely new we should not be disposed to hold a different doctrine; and we think the English decisions are in entire conformity to our own.'

In *Reynolds* v *Douglas*, 12 Pet. 504, decided at the same Term and referred to in the foregoing extract, Mr. Justice McLean stated the rule to be, 'That, to entitle the plaintiffs to recover on said letter of credit, they must prove that notice had been given in a reasonable time after said letter of credit had been accepted by them, to the defendants, that the same had been accepted.' * * *

There seems to be some confusion as to the reason and foundation of the rule, and consequently, some uncertainty as to the circumstances in which it is applicable. *In some instances it has been treated as a rule, inhering in the very nature and definition of every contract*, which required the assent of a party to whom a proposal is made to be signified to the party making it, in order

to constitute a binding promise; in others it has been considered as a rule springing from the peculiar nature of the contract of guaranty, which requires, after the formation of the obligation of the guarantor, and as one of its incidents, that notice should be given of the intention of the guarantee to act under it as a condition of the promise of being the guarantor.

The former is the sense in which the rule is to be understood as having been applied in the decision of this court. This appears very plainly, not only from a particular consideration of the cases themselves, but was formally declared to be so by Mr. Justice Nelson, speaking for the Court in delivering its opinion in the case of *Mfg. Co.* v. *Welch*, 10 How. 475, where he uses this language:

> "He (the guarantor) has already had notice of the acceptance of the guaranty and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this Court, according to all the cases; *it is deemed essential to an inception of the contract;* he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate or be charged with notice upon an amount of indebtedness to the extent of the credit pledged."

The last italics are those of the Court.

This case establishes the principle that contracts of guaranty do not stand upon any other ground than other contracts in regard to acceptance and notice to the person making the offer.

This case was followed by the case of *Davis Sewing Machine Co.* v *Richards*, 115 U. S. 524. That case was stated by this Court, as follows.

> "This was an action, brought in the Supreme Court of the District of Columbia, upon a guaranty of the performance by one John W. Poler of a contract under seal, dated December 17, 1872, between him and the Plaintiff Corporation, by which it was agreed that all sales of sewing machines which the Corporation should make to him should be upon certain terms and conditions, the principal of which were that Poler should use all reasonable efforts to introduce, supply and sell the machines of the Corporation, at not less than its regular retail price, throughout the District of Columbia, and the Counties of Prince George and Montgomery in the State of Maryland, and should pay all indebtedness by account, note, indorsement or otherwise, which should arise from him to the Corporation under the contract, and should not engage in the sale of sewing machines of any other manufacture; and that the Corporation during the continuance of the agency, should sell its machines to him at a certain discount, and receive pay-

ment therefor in a certain manner; and that either party might terminate the agency at pleasure."

The guaranty was upon the same paper with the above contract, and was as follows:

"For value received, we hereby guarantee to the Davis Sewing Machine Company of Watertown, N. Y., the full performance of the foregoing contract on the part of John W. Poler, and the payment of all indebtedness, by account, note, indorsement of notes (including renewals and extensions) or otherwise, to the said Davis Sewing Machine Company, for property sold to said John W. Poler, under this contract, to the amount of three thousand ($3,000) dollars.

Dated Washington, D. C., this 17th day of December, 1872.

A. ROTHWELL,
A. C. RICHARDS.'

Under the guaranty were these words, "I consider the above sureties entirely responsible. Washington. ecember 19, 1872. J. T. STEVENS."

"At the trial the above papers, signed by the parties were given in evidence by the plaintiff, and there was proof of the following facts: on December 17, 1872, at Washington, the contract was executed by Poler, and the guaranty was signed by the defendants, and the contract and guaranty after being so signed, were delivered

by the defendants to Poler, and by Poler to Stevens, the plaintiff's attorney, and by Stevens afterwards forwarded, with his recommendation of the sureties to the plaintiff at Watertown in the State of New York, and the contract there executed by the plaintiff. The plaintiff afterwards delivered goods to Poler under the contract, and he did not pay for them. The defendants had no notice of the plaintiff's execution of the contract or acceptance of the guaranty, and no notice or knowledge that the plaintiff had furnished any goods to Poler under contract or upon the faith of the guaranty, until January, 1875, when payment therefor was demanded by the plaintiff of the defendants, and refused. At the time of the signing the guaranty the plaintiff had furnished no goods to Poler, and the negotiations then pending between the plaintiff and Poler related to the prospective transactions between them." The Court by Mr. Justice Gray, then says:

"The decision of this case depends upon the application of the rules of law stated in the opinion in the recent case of *Davis* v *Wells*, 104 U. S. 159 (Bk. 26, L. ed. 686), in which the earlier decisions of this Court upon the subject are reviewed.

"Those rules may be summed up as follows: A contract of guaranty, *like every other contract*, can only be made by the mutual assent of the parties. If the guaranty is signed by the

guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract.

"The case at bar belongs to the latter class. There is no evidence of any request from the plaintiff corporation to the guarantors, or of any consideration moving from it and received or acknowledged by them at the time of their signing the guaranty. The general words at the beginning of the guaranty, 'value received,' without stating from whom, are quite as consistent with a consideration received by the guarantors from the principal debtor only. The certificate of the sufficiency of the guarantors, written by the plaintiff's attorney under the guaranty, bears date two days later than the guaranty itself. The Plaintiff's original contract with the principal debtor was not executed by the Plaintiff until after that. The guarantors had no notice that their sufficiency had

> been approved or that their guaranty had been accepted, or even that the original contract had been executed or asented to by the Plaintiff, un til long afterwards, when payment was demanded of them for goods supplied by the Plaintiff to the principal debtors."

In the State of Illinois the rules laid down in *Davis* v. *Wells-Fargo & Co., and Davis Sewing Machine Co.* v *Richards, supra,* have been followed.

In the comparatively recent case of *Frost* v *Standard Metal Co.*, 215 Ill. 240, the rule laid down in *Davis Sewing Machine Co.* v *Richards, supra,* is applied to a state of facts where there had been previous negotiation between the parties, and the guarantor was advised that the promisee would not extend credit unless he guaranteed and knew when he signed the guaranty he had already been accepted as guarantor and that credit would be extended upon the faith of his guaranty.

The case of *Cooke* v. *Orne*, 37 Ill. 186, was decided before the decision in *Davis* v *Wells, Fargo & Co.* and *Davis Sewing Machine Co.* v *Richards,* but recognizes and applies the rule laid down in the latter case.

In *Newman* v *Streator Coal Co.*, 19 Ill. App. 594, the rules are recognized and the whole doctrine thoroughly discussed.

In *Ruffner* v *Love*, 33 Ill. App. 601, the opinion was delivered by Justice Moran, and the case is cited with approval in later Appellate Court decisions. In that case it is said on page 605 of the opinion:

> "It is essential to the formation of this, as well as of all other contracts, that the minds of the parties shall meet.
>
> "Where there is a mere proposal of one to guarantee the performance of the undertaking by another, if credit be extended to such other the contract of guaranty is not complete till the credit is extended and notice given of the acceptance of the guaranty."

And again on page 606 it is said:

> "That there must be notice to the guarantor of the acceptance of such a guaranty is settled beyond dispute by the authorities. *Newman* v *Streator Coal Co.*, 19 Ill. App. 594, and cases there cited; *Wells* v *Davis*, 104 U. S. 159; *Davis Sewing Machine Co* v *Richards*, 115 U. S. 524; *Gardiner* v *Loyd*, 110 Pa. St. 278."

The case of *Sears* v. *Swift & Co.*, 66 Ill. App., 496 recognizes the rule and cites *Ruffner* v *Love*, 33 Ill. App., *Meyer* v *Ruhstadt*, *Idem*, 346, and *Neagle* v *Ruhstadt*, 601, with approval. In *Marshall Field & Co.* v *Haish*, 85 Ill. App. 164, the rule laid down in *Davis Sewing Machine Co.* v *Richards* is followed and the language of the Court in that case quoted on Page 167 of the opinion.

In *Acorn Brass Mfg. Co.* v *Gillmore,* 142 Ill. App. 567, the facts were that one Dr. Stevens placed an order with and applied to Appellant for credit, at the same time stating that Appellee would guarantee his account. Thereupon Appellant wrote Appellee what Dr. Stevens had said and asking him if correct, for a letter of credit. Appellee replied it was correct and that he would be responsibe to the amount of $500. Appellee answered on the same day accepting the guarantee and afterwards extended the credit. The Court correctly held Appellee liable under the rule laid down in *Davis Sewing Machine Co.* v *Richards, supra.*

In *Pressed Radiator Co.* v *Hughes,* 155 Ill. App. 80, one Sexton had a contract for installing some radiators in Hughes' building, and ordered a number of radiators of the Radiator Co., through its agent, Ostrander. After receiving the order Ostrander applied to Hughes to guarantee the payment for the goods and Hughes wrote the guarantee and delivered it to Ostrander and the radiators were sent and installed. Here there was previous negotiation within the rule in *Davis Sewing Machine Co.* v *Richards,* and the guarantee was not to be subject to approval of the Radiator Co., but was given in pursuance of a previous request and agreement. The Court correctly apply the rule and cite *Davis Sewing Machine Co.* v *Richards* in support thereof.

It will be seen that the Illinois Courts do not lay down a different rule, but in each case attempt to follow the law as stated by this court. Now bearing in mind the rule as summed up and stated in *Davis Sewing Machine Co.* v. *Richards*, "a contract of guaranty, like every other contract, can only be made by the mutual assent of the parties. *If the guaranty is signed by the guarantor at the request of the other party, or if the latter's agreement to accept is contemporaneous with the guaranty, or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty*, the mutual assent is proved, and the delivery of the guaranty to him or for his use completes the contract. *But if the guaranty is signed by the guarantor without any previous request of the other party, and in his absence, for no consideration moving between them except future advances to be made to the principal debtor*, the guaranty is, in legal effect, an offer or proposal on the part of the guarantor, needing an acceptance by the other party to complete the contract," and applying it to this case, the facts as certified are that there never had been any previous negotiations between the Defendants and Plaintiff prior to signing the bond, that there was no agreement by Plaintiff contemporaneous with signing the bond to accept it; (but on the contrary

it was expressly made subject to approval of the financial standing of the signers) that no receipt from Plaintiff of any consideration, however small, is acknowledged in the bond. Under these facts how can it be fairly contended that the law as laid down by this Court requiring notce of acceptance to the signers does not apply?

That some Courts have been confused and misapprehended the rule is shown in some of the cases cited in Plaintiff in Error's brief. Such confusion and misapprehension is referred to in the recent case of *Smith & Co.* v. *Therman*, 20 Okla. 133, 15 Ann. Cas. 1161, as follows:

> "It is a settled rule of law of the Supreme Court of the United States that before a guarantor is bound by any offer of guaranty, the guarantee must have accepted the offer of guaranty, and the guarantor received notice of such acceptance; and the same rule prevails in nearly all of the State courts. There is no little confusion and what appears to be contradiction in the decisions of many of the State courts, but most of this confusion, and what appears to be conflict of authorities, result from the courts construing very similar instruments in some cases to be offers of guaranty and in other instances as being absolute guaranties, or completed guaranty contracts. The Supreme Court of the United States, in construing an instrument similar to the alleged guaranty in this case, in the case of

Davis Sewing Mach. Co. v. *Richards*, 115 U. S. 524, 6 S. Ct. 173, 29 U. S. (L. Ed.) 480, summed up the rules of law governing that court as follows:"

The Court then quotes the language already several times quoted here.

The editors of the Annotation on page 1164 use the following language:

> "There is a great deal of confusion and seeming contradiction in the cases passing upon the distinction between an absolute guaranty and a mere offer or overture to guarantee. The difficulty seems to lie not so much in the principles as formulated and stated, as in their application to the particular facts in controversy, similar instruments being construed in some cases to be mere offers to guarantee, and in other instances to be absolute guaranties."

The opinion of the Court in *Deering* v. *Mortell*, S. D., 110 N. W. 86, 16 L. R. A. (N. S.) 352, also recognizes this conclusion.

In the two last cases as also in the two cases decided by this Court, the form of the guaranty was positive and absolute, but as shown in the decisions, the fact whether there was mutual assent was the sole and controlling question and not the form or words of the writing or instrument.

In the case of *Bishop* v. *Eton*, 161 Mass. 496, 42 Am. St. Rep. 437, the Defendant wrote the Plaintiff: "If Harry needs more money, let him have it, or assist him to get it and I will see that it is paid." The Plaintiff advanced the money and afterwards sued the Defendant on his promises. The Court held that the Plaintiff not having notified the Defendant of the acceptance of his agreement could not recover. In the course of the opinion the Court says:

> "Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer for the doing of the act is a sufficient acceptance and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer, but if the act is *of such a kind* that knowledge of it will not quickly come to the promisor the promisee is bound to give him notice of his acceptance *within a reasonable time* after doing that which constitutes the acceptance. In such a case it is implied in the offer that to complete the contract notice shall be given with due diligence so that the promisor may know that a contract has been made * * * where the guarantor would not know of himself from the nature of the transaction whether the offer has been accepted or not that he is not bound without notice of the acceptance seasonably given after the performance which constitutes the consideration.
>
> "*Babcock* v. *Bryant*, 12 Allen 133.
> "*Whiting* v. *Stacy*, 15 Gray 270.
> "*Schlersinger* v. *Dickinson*, 5 Allen 47."

And again, "When an offer of guaranty of this kind is made the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way."

In *McIntosh-Huntington* v. *Reed*, 89 Fed. Rep., 464, referred to by counsel for Plaintiff in Error, Judge Buffington distinctly held that the contract in that case was not one of guaranty at all, but an absolute unconditional promise of the Defendant to pay, and that, therefore, no notice of acceptance was necessary.

Counsel also refer to the case of *Barnes Cycle Co.* v. *Reed*, 84 Fed. Rep., 603, decided by Judge Buffington and reversed by the Circuit Court of Appeals, *Barnes Cycle Co.* v. *Reed*, 91 Fed. Rep., 481, but the Circuit Court of Appeals expressly agree with the trial Court in that case in its conclusion that the paper there in question, although absolute in form, was not an unconditional guaranty, but fell within the rule of *Machine Co.* v. *Richards*, 115 U. S., 524, requiring notice of acceptance and reversed the case solely because they were of the opinion that the evidence would warrant a jury in finding that the Defendant had received notice within a reasonable time that the Plaintiff had accepted and acted upon his guaranty. It was therefore held to have been error to direct a verdict for the Defendant and the cause was remanded for a new trial.

We quote the form of the instrument in that case, in order that it may be seen that while it was absolute in form, the trial Court and the Court of Appeals held that it was not complete without notice.

> "In consideration of the execution by the Barnes Cycle Company of the foregoing contract with Leo Schlaudecker, Erie, Pa., and the sum of one dollar, receipt whereof is hereby acknowledged, I hereby guarantee the payment, when the same becomes due, of all sums owing, or which may hereafter be owing, for bicycles and bicycle attachments, sold and delivered by said Barnes Cycle Company to said Leo Schlaudecker, under this contract, and for the like consideration, I further guarantee the performance by said Leo Schlaudecker of all the other provisions of said contract on his part to be performed.
>
> Dated Erie, Pa., Feb. 10, 1896.
>
> "CHAS. M. REED."

IV.

THE FACT THAT THE INSTRUMENT IN SUIT WAS IN THE FORM OF A BOND UNDER SEAL DOES NOT TAKE IT OUT OF THE RULE OF DAVIS V. WELLS, 104 U. S. 159 AND DAVIS V. RICHARDS, 115 U. S. 524.

The consideration imported by a seal is due to a legal fiction, whereas the particular necessity for a consideration within the rule of these cases arises because of the requirement of proof of mutuality of assent. "Or if the receipt from him of a valuable consideration, however small, is acknowledged in the guaranty, the mutual

assent is proved and the delivery of the guaranty to him or for his use completes the contract."

Davis v. *Wells, supra.*

That mutuailty of assent could not be established by the affixing of a seal seems clear. In the case of *Davis* v. *Wells, supra,* the instrument in question was under seal but the decision of the case was based upon the recital of the consideration in the instrument, evidencing the assent. In *Hall* v. *Weaver,* 34 Fed. Rep., 106, the instrument in question was in the form of a bond under seal, yet the doctrine of notice of acceptance was not considered inapplicable on that ground, but the decision was based upon the construction of the instrument as one of indemnity rather than guaranty.

Counsel for Plaintiff in Error appear to argue that the doctrine of notice of acceptance is not applicable at all to writings obligatory; that its operation is limited to transactions between merchants, letters of credit, etc. The rule is not so limited. "On the other hand, impelled by the *analogies* of the law merchant and by considerations of fairness to the guarantor to whom knowledge of acceptance would not in the ordinary case come quickly, by far the greater number of American courts require notice so that he may know of his liability and take steps to protect himself."

20 *Harvard Law Review,* page 486.

The concession that the principle of notice was partly drawn from analogies of the law merchant might be made without at all limiting its application to transactions between merchants. It is not conceived that there is any limitation to the application of the rule where the instrument is under a given state of facts determined to be a mere offer of guaranty and certainly this Court has given the rule a broad application. "As a rule inhering in the very nature and definition of every contract, which requires the assent of a party to whom a proposal is made to be signified to the party making it, in order to constitute a binding promise."

We believe that the equity as well as the law of this case is with the Defendants in Error. The consideration of fairness which supports the rule of notice required that the Defendants be notified that they were to be held liable upon the instrument in suit. Had they been so notified, an opportunity would have been afforded them to obtain counter-security from Dooling, whereas under the facts certified, having no knowledge that they had been accepted on the bond, they had no reason for taking measures for their own protection. We believe also that even if the instrument were in form one of indemnity and not of guaranty, that it did not evidence a completed contract. It was submitted to Defendant with a recommendation that it be accepted—manifestly, it was

in any case only an offer and required a notice from Plaintiff to Defendants before there could be mutuality of assent.

In this connection it is further to be noted that the intended official bond of Dooling had not been signed and a copy of it was not attached to the instrument in suit when the Defendants signed it, thus further emphasizing the nature of the instrument as a mere proposal and the fact that the alleged acceptance in reality imposed a new term not included in the proposal, and required a notice thereof before it could bind the Defendants.

We submit that the first question should be answered in the negative; that the answer to the second question should be that the instrument in suit was a mere offer to become guarantors requiring notice of acceptance in accordance with *Davis* v. *Wells*, 104 U. S., 159, and *Davis Sewing Machine Co.* v. *Richards*, 115 U. S., 524, and that the answer to the third question should be in the negative.

Respectfully submitted,

ALBERT SALZENSTEIN,
WALTER M. ALLEN,
Counsel for Defendants in Error.

No. 12

see No. 9.